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JAMES D. MAHER
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IN THE

Supreme Court of the United States

DAN S. LEHON,
Plaintiff in Error
vs.
THE CITY OF ATLANTA,
Defendant in Error

No. 914
October Term, 1914

Motion to Advance for Hearing

JOHN D. LITTLE
ARTHUR G. POWELL
MARION SMITH
MAX F. GOLDSTEIN
(Atlanta, Ga.)
Attorneys for Movant

JOHNSON-DALLIS CO., ATLANTA, GA.

IN THE SUPREME COURT OF THE UNITED STATES

DAN S. LEHON, Plaintiff in Error, vs. THE CITY OF ATLANTA, Defendant in Error.	No. 914, October Term, 1914. In Error to the Court of Appeals of Georgia.

The plaintiff in error moves the advancement of this case for hearing. It is a criminal case. Besides, a number of other prosecutions are pending in the court below dependent upon the decision.

Briefly stated, the matter involved is this:

The plaintiff in error, as an attache of the W. J. Burns International Detective Agency, was employed by the friends of Leo M. Frank, who had been convicted of murder in the courts of Fulton County, Georgia (in which the City of Atlanta is located), to assist the attorneys for the defense in the procurement and preparation of the affidavits necessary in connection with an extraordinary motion for a new trial which had been filed in that case.

In the Frank case, the Chief of Police of the City of Atlanta was prosecutor, and the police generally were aiding in the prosecution. The City of Atlanta has an ordinance entitled, "Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision," under which it is provided that no one shall

carry on the business of a private detective in Atlanta without permission of the police commissioners and the recommendation of the Chief of Police; and that when any one is licensed by the police commission he shall take the oath of a city detective and be subject to police supervision. The taking of the oath of a city detective makes him a public officer and puts him under control of the Chief of Police. The plaintiff did not comply with the provisions of the ordinance, and he was accused, tried and convicted for acting as a private detective without complying with the ordinance, and sentenced to a month's imprisonment with alternative of a fine of one hundred dollars. He applied to the superior court of the county for certiorari. This was refused. He took writ of error to the Court of Appeals and the conviction was sustained.

The Federal questions made in the trial court, and preserved throughout in the record, and decided against by the Court of Appeals, are these in the main:

The plaintiff in error is a citizen of Louisiana. Under a statute in Georgia, none but citizens of Georgia are eligible to act as detectives. This statute probably refers only to public detectives, but the police commissioners and the Chief of Police in Atlanta construe it as relating to all detectives, public and private; and by a uniform course of practice refuse to recommend or license any person not a resident of Georgia as a private detective. The Court of Appeals held that what the plaintiff in error did, namely receiving the reports of operatives, the interviewing of the witnesses and communicating of the result to Frank's attorneys, constituted the business of a private detective within the purview of the ordinance. One of the assignments of error here, based on the record, makes the point that since, under the ordinance and the ruling of the police commissioners, the plaintiff in error, on account of non-residence, could not be licensed to do this investigating work and was subject to penalty for

doing it without license, whereas citizens of Georgia could be, he was discriminated against, in violation of par. 1, section 2 of article 4 of the Constitution of the United States, which entitles the citizens of each State to all privileges and immunities of citizens in the several States. The point is also made that this violates the 14th Amendment of the Federal Constitution, in that it denies him equal protection of the laws, and deprives him of liberty and property without due process of law.

One of the matters the plaintiff in error was called on to investigate and report on to the attorneys for Frank was certain alleged illegal activities of the Chief of Police and other police officers of the city, in the procurement of evidence against Frank. There is a judicial admission in the record that it was impossible for him to perform these services and comply with the ordinance, that is to say, comply with it by disclosing to the Chief of Police the nature of his employment and working under the supervision of the Chief of Police, who was the prosecutor and one of the persons against whom the investigations were directed. It is insisted that the enforcement of the ordinance and the preventing of these things being done, deprived both Frank and the plaintiff in error of liberty and property without due process of law, and denied to them the equal protection of the laws: that the work the plaintiff in error was called on to perform was a legitimate employment and that the privilege of pursuing the employment was destroyed by the ordinance; that equal protection of the laws was abrogated by the requirement that those investigating for the defense in a criminal case should work under the supervision of and at the will of the prosecutor in that case.

The record also presents the point that the business the plaintiff in error sought to pursue was a legitimate and gainful occupation and that the ordinance by abolishing the business of private detective (especially as to the activities which the court below construed to be within

the purview of the ordinance) and in requiring all detectives to become public detectives deprived him of the right to pursue this occupation in violation of the 14th Amendment of the Federal Constitution.

Briefly stated, these are the main questions in the case; though other reasons, or amplification of these reasons why the ordinances violate federal constitutional rights appear in the record.

Due notice of the intention to file this motion has been given to opposing counsel.

Respectfully submitted,

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for the Movant.

Due and legal service of the foregoing motion is acknowledged. Further notice is waived. We join in asking that the case be advanced.

This April 28th, 1915.

JAMES L. MAYSON,
WILLIAM D. ELLIS, JR.,
Attorneys for the City of Atlanta.

IN THE

Supreme Court of the United States.

DAN S. LEHON, Plaintiff in Error. *vs.* CITY OF ATLANTA, Defendant in Error.	No. 103. October Term, 1916.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the City of Atlanta, defendant in error, and moves this Honorable Court to dismiss the writ of error issued in the above case, and for cause thereof shows as follows:

Dan S. Lehon was convicted in the Recorder's Court of the City of Atlanta for the violation of an ordinance of the city and sentenced to pay a fine of $100 and costs.

He thereupon applied to the Judge of the Superior Court of Fulton County, Georgia, for a writ of certiorari, and the Judge declined to sanction the application, and refused to order the issuance of the writ.

Whereupon said Dan S. Lehon excepted to the order of the Judge of the Superior Court, declining to order the writ of certiorari, and carried same, by writ of error, to the Court of Appeals of Georgia.

The Court of Appeals held that the sentence imposed under the ordinance of the City of Atlanta was legal, and that same did not violate any of the provisions of the Constitution of the State or of the United States in any particulars upon which a decision was sought.

A writ of error was sued out returnable to the Supreme Court of the United States, and the plaintiff in error assigns error as follows:

I. That the Court of Appeals of the State of Georgia erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari presented by the plaintiff in error, seeking to review and set aside the conviction of the plaintiff in error in the Recorder's Court of the City of Atlanta, on the ground that the ordinances of the City of Atlanta were and are void and unconstitutional in that the enforcement of said ordinances deprived said plaintiff in error of his liberty and property without due process of law, and also in that they denied to him the equal protection of the laws (thereby being repugnant to the fourteenth amendment of the Constitution of the United States), and in that the enforcement of said ordinances denied to plaintiff in error, who was a citizen of the State of Louisiana, privileges which were allowed to citizens of the State of Georgia, namely, the privilege of engaging in the work of a private detective (thereby being repugnant to and violative of Paragraph 1, Section 2 of Article 4 of the Constitution of the United States), and that the decision and judgment of the Court of Appeals of Georgia was, therefore, violative of and repugnant to the Constitution of the United States, and especially the portions thereof referred to above.

II. The said court erred in holding and adjudging that the municipal ordinances of the City of Atlanta under which the plaintiff in error was convicted in the Recorder's Court of the City of Atlanta were not and are not, as applied to the plaintiff in error in the present case, unconstitutional, null and void because they were and are repugnant to and violative of the fourteenth amendment of the Constitution of the United States for the reason that the said ordinances and the enforcement thereof deprived

the plaintiff in error of his liberty and property without due process of law, and denied to him, as a person within the jurisdiction of the State of Georgia, the equal protection of the laws.

III. That said court erred in holding and adjudging that the making and enforcement of the municipal ordinances of the City of Atlanta under which the plaintiff in error was tried and convicted in the Recorder's Court of the City of Atlanta were not and are not violative of and repugnant to Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, which provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

IV. That the said court erred in holding and adjudging that no defense was presented by special plea filed by the plaintiff in error in the Recorder's Court of the City of Atlanta, wherein the plaintiff in error specifically set up and pleaded that the ordinances of the City of Atlanta under which he was accused were unconstitutional, null and void in that they deprived him of his liberty and property without due process of law, and denied to him the equal protection of the laws, also in that they deprived Leo M. Frank, the person on whose behalf plaintiff in error was acting in the transaction for which he stood charged, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; also, in that they abridged the privileges and immunities of plaintiff in error, who was a citizen of the State of Louisiana, and of the United States, in that said ordinances denied to him the privileges and immunities enjoyed by citizens of the State of Georgia likewise circumstanced; and also that the enforcement of said ordinances, under the facts in said special plea recited (and by the demurrer thereto admitted to be true), deprived the plaintiff in error, and also said Leo M. Frank, for whom he was acting as aforesaid, and each of them, of

their liberty and property without due process of law, and denied to each of them the equal protection of the laws, and abridged the privileges and immunities of plaintiff in error as a citizen of the United States, and discriminated against him as a citizen of another State by refusing to him the privileges to which the citizens of the several States were entitled, and which, in the enforcement of said ordinances, were so limited as to be enjoyed only by citizens of the State of Georgia, and in adjudging and holding that said special plea was insufficient in law; and that the said Court of Appeals erred in sustaining the action of the Recorder of the City of Atlanta in striking and dismissing said special plea as being insufficient in law.

V. That said court erred in holding and deciding that the right guaranteed to the plaintiff in error by Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, which provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," had not been denied to him in the enforcement of the ordinances of the City of Atlanta, under which he was tried and convicted in the Recorder's Court of the City of Atlanta; notwithstanding he was charged with having acted as a private detective in the City of Atlanta without having been approved by the Chief of Police of said City of Atlanta, and without a permit from the Police Commissioners of said city, and it appeared that the plaintiff in error was a citizen of the State of Louisiana, and that under the views of the law as held by the Chief of Police of Atlanta, he approved only citizens of Georgia as private detectives, and, under the views of the law as held by the Police Commissioners, and their uniform course of practice, said Commissioners granted permits only to citizens of the State of Georgia to act as private detectives.

VI. That the court erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanc-

tion the petition for certiorari of plaintiff in error, brought to review and reverse the judgment of the Recorder of the City of Atlanta, convicting him of violating the ordinances of said city by carrying on a private detective agency, and doing the business of a private detective, in that the court held that the acts shown by the evidence to have been done by the plaintiff in error (in substance that he was a managing agent or supervisor of a private detective agency, which through another agent had been duly licensed and granted a permit to do business in Atlanta, assisted the defendant in a criminal case and his attorneys in the preparation of an extraordinary motion for a new trial, by openly, and not secretly, interviewing the witnesses who had made and who were about to make affidavits for use in said case, and by acting as a go-between, or as a channel, for conveying information to and from the defendant's counsel and the detective operatives employed on the case by the employer of the plaintiff in error), came within the purview of the said ordinances, and in that the court, in connection with this construction of the ordinances, held that the ordinances so construed and enforced against said plaintiff in error did not deprive him of his liberty and property without due process of law.

VII. That the court erred in holding that the ordinances of the City of Atlanta, under which the plaintiff in error was convicted, are not and were not void and unconstitutional as applied to the transaction for which the plaintiff in error was convicted, in that they deprived the plaintiff in error of his liberty and property without due process of law, and denied the equal protection of the laws to him, and also in that they deprived the person for whom plaintiff in error was employed and acting, namely, Leo M. Frank, a prisoner charged with and convicted of murder, with a motion for new trial pending, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; and in sustaining the enforcement of said ordinances against

the said constitutional provisions, notwithstanding that it became necessary and important to the defense of said Leo M. Frank against the charge aforesaid that he employ said plaintiff in error to perform for him the services which said court held to constitute engaging in the business of a private detective within the purview of said ordinances, and notwithstanding it appeared that the Chief of Police of Atlanta (whose approval under said ordinance was a condition precedent to the plaintiff in error being permitted to perform said services, and under whose supervision the plaintiff in error would have been compelled to perform said services, if he had complied with said ordinances) was prosecutor in the said case against said Leo M. Frank, so that said services could not have been performed for said Leo M. Frank if the plaintiff in error had complied with said ordinances, and notwithstanding the effect of said ordinances was to compel the defense in said case of Leo M. Frank to disclose its activities in preparing its evidence to the prosecutor without requiring the prosecution to make like disclosure to the defendant; and especially so since the chief object and need of the employment of the plaintiff in error was to prepare the evidence as to alleged illegal methods used by said Chief of Police, the prosecutor, and those working under him in procuring and presenting evidence against said Leo M. Frank in said matter.

Defendant in error respectfully prays this Honorable Court to dismiss the writ of error issued in this case upon the following grounds:

1st. The record discloses the fact that the plaintiff in error did not make an application to the City of Atlanta or its Board of Police Commissioners for permission to follow the avocation of a detective, and therefore he is not in position to claim discrimination against him, no decision having been rendered for or against him by the City of Atlanta or its Board of Police Commissioners.

2. The record discloses the further fact that the Burns Agency, with which plaintiff in error is connected, had a representative in the City of Atlanta, being a citizen thereof, to whom a license was issued and through whom this agency did business in the city prior to the time said Lehon undertook to follow the avocation of a detective in said city. Therefore, he cannot claim any discrimination either against him or his agency.

3rd. The record discloses that the Burns Agency was licensed in the name of a citizen of the City of Atlanta to do business therein, and that, under this license, plaintiff in error could have been authorized to pursue his avocation in the City of Atlanta by recommendation of the Board of Police Commissioners, and that this local agent of the Burns Agency had, prior to the advent of plaintiff in error, a number of representatives so recommended. Hence, the action of plaintiff in error was premeditated, and his failure to secure permission to follow his business therein was not an oversight, but was purposely done, and, therefore, he cannot claim any discrimination against him or his agency on account of the existence of the ordinance under which he was convicted.

4th. The State of Georgia passed an Act providing that no detective could follow his avocation in the State unless permission to do so was granted by proper authorities, and the City of Atlanta was duly authorized to grant or refuse such permission, and this law, as well as the ordinances of the City of Atlanta, was an effort only to control the business of being a peace officer, or a detective, and that this power is inherent in every State and every locality, and that no right exists in the plaintiff in error to go into a community and undertake to go into the detective business without the permission of the community.

5th. The record discloses that the several constitutional provisions referred to, upon which the Court of Appeals passed, and which are made the basis of assignment of error to this court, have not been violated.

6th. Furthermore, it is manifest that the writ of error is taken for delay only, and that the questions on which the jurisdiction depends are so frivolous as not to need further argument, inasmuch as these questions have repeatedly been before this Honorable Court, and have often been decided adverse to the contentions of the plaintiff in error.

Wherefore, The City of Atlanta, defendant in error, prays this Honorable Court that the writ of error issued in this case be dismissed, or that the decision complained of be affirmed.

JAMES L. MAYSON,
SAML. D. HEWLETT,
Of Counsel for Defendant in Error.

I have read the foregoing motion by me subscribed, and the facts therein stated are true to the best of my information and belief.

JAMES L. MAYSON,

Sworn to and subscribed before me this
the 5th day of August, 1916.

FRED R. MILLER,
Notary Public, Fulton County, Georgia.
(Seal Attached.)

In the Supreme Court of the United States.

DAN S. LEHON, Plaintiff in Error, *vs.* CITY OF ATLANTA, Defendant in Error.	No. 103. October Term, 1916.

To Plaintiff in Error, or Attorneys, John D. Little, Arthur G. Powell, Marion Smith, Max F. Goldstein:

You are hereby notified that a motion to dismiss or affirm the writ of error in the above case will be submitted to the Justices of the Supreme Court of the United States on the 9th day of October, 1916.

Copy of said motion is herewith furnished you, together with the copy of printed briefs to be submitted thereon, as required by the rules of said court.

JAMES L. MAYSON,
SAML. D. HEWLETT,
Of Counsel for Defendant in Error.

Copy of the above notice received, together with a copy of the motion to dismiss or affirm, and a copy of the printed brief submitted thereon.

This the 6th day of September, 1916.

MAX F. GOLDSTEIN,
Of Counsel for Plaintiff in Error.

[redacted]

IN THE

Supreme Court of the United States.

(No. 103)

OCTOBER TERM. 1916

DAN S. LEHON, - - - - - - - *Plaintiff in Error,*

vs.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS

CITY OF ATLANTA, - - - - - - - *Defendant in Error.*

GENERAL STATEMENT.

This is a motion to dismiss or affirm a writ of error to reverse the decision of the Court of Appeals of Georgia (16 Ga. App. Report, page 64), affirming the judgment of the Superior Court of Fulton County, Georgia, which declined to sanction a petition for certiorari on the conviction of said Lehon in the Recorder's Court of the City of Atlanta.

Lehon was convicted in the Recorder's Court of the City of Atlanta for violating an ordinance of the city, found in the printed record on pages 35 and 36, which established a penalty for engaging in the business of being a private detective or detective agency unless the person or corporation undertaking this business had first secured a recommendation therefor from the Board of Police Commissioners of the city.

This ordinance provided that when this Board recommended the application, a license would be issued to such person or corporation to undertake this business, upon

taking the oath of a city detective, subjecting themselves to the police supervision of said city.

The plaintiff in error, Dan S. Lehon, was found guilty of violating this ordinance and it was admitted, during the trial in the police court, that he had never applied for this recommendation from the Board of Police Commissioners or the Chief of Police of the City of Atlanta, see page 11 of the printed record.

In brief, the plaintiff in error claims that because he was a citizen of the State of Louisiana at the time he undertook the business of being a detective in the City of Atlanta, that he was not required to go before the Board and secure this recommendation, especially in view of the fact that, as he claimed, this Board would have declined his application, as its custom was to license only residents of the State of Georgia.

Assignments of Error.

On the printed record, on pages 52, 53, 54 and 55, will be found in detail the specific assignments of error.

In brief, the plaintiff in error alleges that this ordinance was unconstitutional in that the enforcement of the ordinance deprived him of his liberty and property without due process of law and, also, in that it deprived him of equal protection of the laws, and in that the enforcement of said ordinance denied to him the privileges which were allowed the citizens of the State of Georgia.

Argument.

The City of Atlanta insists that the principles of law appealed to in this case have been settled for many years by the decisions of this court, and that the application of them to the facts of the present case involves nothing

new or novel, and that the facts of the present case present no question to this court which has not already been decided and, therefore, the writ of error should be dismissed and the decision of the lower court affirmed without further hearing.

However, the City of Atlanta especially insists that the present plaintiff in error is in no position to raise the questions here sought to be made because he made no application to the Board of Police Commissioners of the City of Atlanta for this recommendation, and, therefore, he cannot attack the enforcement of the ordinance, nor can he attack the method by which the ordinance was enforced.

Certainly plaintiff in error cannot leave the State of Louisiana, cross over to the State of Georgia and invade the City of Atlanta, and there set up business, and when he is prosecuted in the Recorder's Court for the violation of this ordinance, then make the point that he did not apply for the recommendation because same would not have been given to him.

After asserting that the recommendation would not have been given to him, he then proceeds to say that the ordinance is unconstitutional in that it deprives him of several very important constitutional rights.

This court in the case of Gundling vs. Chicago, 177 U. S. 183, had before it the consideration of a similar question where plaintiff in error was required to make an application to secure a license and did not do so, but when prosecuted for a violation of the ordinance undertook to attack the enforcement of the same as arbitrary and impartial.

Mr. Justice Peckham said: "Among the grounds of attack were the deprivation of property, arbitrary power,

denial of equal protection of the laws, etc."

In the course of the decision the court said:

> "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. *Non constat* that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of this discretion in his favor and was not refused a license."

We think that it is very clearly indicated in this excerpt that the court would not very seriously consider an attack upon the enforcement of an ordinance where the party making the attack had never submitted an application, and was not in position, as to himself, to show a refusal of grant of the permission sought.

The Court of Appeals of Georgia, Lehon vs. City of Atlanta, 16 Ga. App. Report 65, sixth head note, states the principle very clearly as follows:

> "The municipal ordinances under which the accused was convicted are not unconstitutional and void for the reason that they are in violation of the 5th amendment or the 14th amendment to the Constitution of the United States, in that the plaintiff in error was thereby deprived of a property right without due process of law or deprived of equal protection of the laws; nor does it appear that in the application and enforcement of the ordinances the plaintiff in error, as a citizen of the State of Louisiana, was denied any privileges or immunity extended to the citizens of the State of Georgia,

especially in view of the fact that it appears undisputed in the evidence that he never made application for a license to act as a detective under the municipal ordinances, and, therefore, that no application upon his part to carry on his business in accordance with the municipal ordinances was refused by the officers of the municipality. Even if Sections 337 and 338 of the Penal Code include private detectives within their provisions (and this is not ruled), the quasi official character of such peace officers renders the importance of the requirements that they be citizens of the State, a reasonable exercise of the State's sovereignty within its territorial jurisdiction. If private detectives are not included in the provisions of Sections 337 and 338, then the ordinances under review in the present case are not void because they impinge upon the laws of the State, nor because they deprive citizens of another State of the equal protection of the laws; for they contain no requirement that applicants for license as a city detective shall be residents of the State of Georgia. So far as the plaintiff in error is concerned or affected thereby, the ordinances in question are not unconstitutional or void because of the construction given to them in their administration by the officers of the municipality, since he neither filed any application to be himself licensed as a private detective, nor took any step to have his name placed upon the list of the approved employees of the detective agency by which he was employed, and which had been licensed by the municipality; and therefore, as to him, the ordinances were never construed at all."

The Burns Agency, with which Lehon was connected, had a license in Atlanta through a local man.

C. E. Sears, as shown by evidence, reported on pages

13 and 14 of the printed record, testified that he was the local manager of the Burns Agency, that is, local manager of the Atlantic branch. He exhibited a license registered with the city for the business of carrying on a detective agency.

It appeared that he applied to the Police Commission for a recommendation.

> "I let the Commission know that I was applying for it as agent of William J. Burns. Some questions were asked me by some members of the Board, and I stated to them that Mr. Burns was the head of the agency. I know Dan S. Lehon. He resides in New Orleans, is a citizen of Louisiana and of the United States. *He was working for Mr. Burns in what is known as the Mary Phagan or Leo Frank case.*
>
> "He came here to assist Mr. Burns in the Phagan case and is serving under Mr. Burns in what you might call detective work. He is here yet. He is here now. Has been on the case all the time. His name has never been reported by me to the police commission as a detective."

Again, in connection with the foregoing evidence, this witness testified:

> "I don't think it was necessary to have had him passed on by the Police Board nor for him to work under my license."

Further on, on page 15 of the printed record, this witness testified about the list of persons, being the list set out as reported to the Chief of Police, it is "one of the lists which I furnished to the Chief of Police."

The Chief of Police, on page 10, testified that the Pinkerton people had secured a license, through a former chief, Jennings, the agency standing in his, Jennings', name, and he submits the names of the operators to the Board.

Further on, on page 10, Chief Beavers testified:

> "Mr. Sears' application was passed up favorably by the Board to carry on a detective agency. He was passed up as an agent of the W. J. Burns Detective Agency, but the license was passed up in his name."

So, from the evidence of Sears, a representative of the Burns Agency, and of Beavers, the Chief of Police, it appears that the Burns Agency, through Sears, had permission to operate in the City of Atlanta, but that each operator was required to be reported to the Chief of Police, in the course of his operation as a detective in the city, and that this report was uniformly made, except in the instant case.

It further appeared that Pinkerton people operated in the same manner.

Therefore, we submit to the court that the agency, represented by Lehon, was licensed by the City of Atlanta, and that all Lehon had to do was to have his name reported to the Chief of Police and thereby secure all the privileges allowed any detective or detective agency.

It thus appears that Lehon purposely declined to have his name or his operations reported to the Chief of Police or Board of Police Commissioners of the City of Atlanta. In fact, Leonard Haas, an attorney, testified to the employment of William J. Burns "to check up the methods used by the police and detectives of the City of

Atlanta against Leo M. Frank." See page 12 of the printed record.

Lehon, plaintiff in error, testified, on page 20 of the printed report, as follows:

> "Q. What about your ability to work under police supervision and to do the work you were engaged in; could it have been done under police supervision effectively for your client? A. No, sir, it could not.
>
> "Q. Could you have made the investigation under police supervision? A. No, I could not.
>
> "Q. Could you have done the work for your client, Leo M. Frank? A. No."

From this it appears that the failure to register as a detective and to apply for recommendation to carry on the work in the City of Atlanta was intentional.

Plaintiff in error states in his evidence, in his opinion, he could not do the work he was employed to do if he complied with the city ordinances.

The present case therefore presents a very clean cut proposition, namely, a non-resident detective comes into a locality and purposely declines to comply with the laws of the locality because it would interfere with his work, and, when prosecuted for the violation of a local ordinance, seeks to justify his actions upon the ground that the ordinance is unconstitutional and void in that it discriminates against him as a citizen of the State of Louisiana.

We respectfully submit that this position is untenable from any standpoint, constitutional or otherwise.

Furthermore, where it appears that his agency had a permit, he is not in position to raise the question be-

cause the record discloses that his agency had a license granted to a local man, and that all plaintiff had to do was to register as required by the municipal ordinance.

The question sought to be made, namely, that the City of Atlanta would not allow a non-resident detective to operate in its territory, cannot be sustained in view of the fact that the Burns Agency, as well as the Pinkerton Agency, both operate in the city through a local man.

The City of Atlanta therefore submits that the record disclosed no discrimination against the plaintiff in error or his agency, but, on the contrary, shows that his agency was licensed and that he purposely declined to register as required by the local law and, hence, the record thus disproves any discrimination.

RIGHTS OF THIRD PARTY NOT ASSERTED BY LEHON.

In the fourth and seventh assignments of error, plaintiff in error undertakes to urge that his conviction was void because the ordinance, as enforced, was unconstitutional in connection with the rights of Leo M. Frank.

We think the principle is thoroughly established that the courts do not consume time in discussing constitutional objections as affecting one not a party to the case.

Cooley on Constitutional Limitations (5th Ed.), page 197, says: "A court will not listen to an objection made to the constitutionality of an act by a party whom it does not affect, and who has, therefore, no interest therein."

In the case of Reed vs. Eatonton, 80 Ga. 755, certain white people attacked a bill alleging that it was unconstitutional because the distribution of the funds was discriminatory as to negroes, but the Supreme Court of Georgia held that the absence of complaint by the negroes displayed satisfaction on their part, and that,

therefore, the white complainants could not urge the supposed rights of the negroes.

The Constitutional Questions.

Aside from the foregoing, which, in our opinion, disposes of any right on the part of the plaintiff in error to have his alleged grounds of complaint considered by this court, we submit that the various attacks upon the ordinance have no merit in them, and that the principles involved have long since been settled and are now well understood.

A detective is, of all persons, a quasi peace officer.

This was stated by the Court of Appeals of Georgia, 16 Ga. App. 64, in saying that, "a detective is in essence a peace officer, and the relinquishment by a municipality of the exercise of the right to supervise and regulate the conduct of a detective would amount, pro tanto, to the surrender or abrogation of appropriate municipal functions."

The States have never surrendered to the Federal Government the power to police its territory.

If the contention of the plaintiff in error is sustained, then detectives could be imported from one State to another and there demand, as a matter of right, all the privileges of a local detective. To state the case seems to us its answer.

A citizen of one State has no right, under the Federal Constitution, to enter into the jurisdiction of another State and there assume any authority over the enforcement of the laws in that community contrary to the laws of that city or locality.

All cities require their policemen to be elected and supervised by a board. Suppose Lehon had undertaken

the authority of a policeman in the City of Atlanta and, when summoned to the Recorder's Court to answer a complaint therefor, should assert his right as a citizen of Louisiana to enter into the State of Georgia and the City of Atlanta and exercise the functions of a police officer, and that, because he understood that the Police Board of the City of Atlanta would give this authority to only residents of Georgia, he, therefore, was exercising this authority without securing permission of the Board of Police Commissioners, and he was protected in this authority by the Constitution of the United States, would there be any serious doubt but that this contention would be both absurd and revolutionary? Now, where Lehon, a citizen of Louisiana, enters into the City of Atlanta and undertakes to discharge the duties of a "quasi peace officer" is not the right of a locality to say whether or not he shall be entrusted with this authority an inherent and supreme right? If this demand on the part of Lehon is sustained, then militia could come from the State of Louisiana, armed and equipped, and march across the State line and set up military authority because the State invaded would not grant the right to bear arms except to its own people. This is an extreme statement, but it is a logical conclusion from the one asserted by plaintiff in error in this case.

The Police Power.

When the right was given to establish a monopoly in the slaughtering of cattle in the State of Louisiana, not permitting any one else to engage in this business, the act authorizing the exercise of such power was violently assailed upon the grounds urged in the present case against the ordinance of the City of Atlanta.

In the present case, the main attack seems to be along the line that the plaintiff in error, a citizen of the State of Louisiana, is, under the ordinance, denied the privileges which were allowed citizens of the State of Georgia.

Mr. Justice Washington, as quoted in the slaughter-house case, said:

> "What are the privileges and immunities of citizens of the several States?" He then proceeds to answer the question as follows:
>
> "We feel no hestitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at times all been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign."

He then says that it would be more tedious than difficult to enumerate:

> "They may all, however, be comprehended under the following general heads: protection by the government with the right to acquire and possess property of every kind, and pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

In the course of the argument, in the slaughter-house case, the court said:

> "But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments, sub-

jecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other, and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt."

PEACE OFFICERS, UNDER STATE LAW, MUST BE RESIDENTS.

By an Act of the General Assembly of Georgia, found in Georgia Laws 1890-1, page 220, it is provided that no sheriff, mayor or other person authorized by law to appoint special deputy sheriffs, constables, marshals, policemen or other peace officers or *detectives* to preserve the public peace or *detect crime*, shall appoint, as such special deputy, special constable, marshal, policeman or other peace officer or detective, any person who is not a citizen of the State, and that no person shall assume these powers "without first having received his appointment in writing from the lawful constituted authorities of the State."

Under this provision the City of Atlanta could not give a license to Lehon to act as a detective because the State law prohibited it, but the city could do, what it did, license his agency through a local man, and this was done.

"A State can restrict the exercise of a vocation to citizens where the vocation is liable to lead to disorder."

Trageser vs. Gray, 73 Md. 250.

"A State can likewise pass a law whereby a li-

cense to retail intoxicating liquors shall be issued only to male inhabitants."

Welsh vs. State, 126 Indiana 71.

EQUAL PROTECTION.

The Federal provision securing equal protection was originally directed against race discrimination.

Slaughter-house Cases, 16 Wallace 36-81.

This doctrine has been very much developed and a majority of the cases, cited under this law, apply to the white rather than to the colored.

Overland vs. Hardy, 139 U. S. 362.

However, the evil can be looked to in order to arrive at the true meaning of the Constitution.

Generally speaking statutes regulating the practice of professions and pursuits of occupations are left to the discretion of the particular State.

People vs. Phippin, 70 Mich. 6.

State vs. Green, 112 Ind. 462.

Wallston vs. Nevin, 128 U. S. 570.

Barbier vs. Connolly, 113 U. S. 32.

Allen vs. Wyckoff, 40 N. J. L. 90.

Philadelphia Fire Association vs. New York, 119 U. S. 110.

We submit that the present case does not present facts calling for the enforcement of this provision of the Constitution.

A possibility of maladministration is not enough.

Williams vs. Mississippi, 170 U. S. 217-219.

Due Process.

This provision of the Constitution has been so often construed that it is easy to say that it applies only where the rights of the individual are taken from him without the orderly procedure in the courts.

Where the plaintiff in error has had his day in court and an opportunity to defend and his right of appeal has been protected, due process of law has been afforded.

Cooley's Constitutional Limitations, Sec. 356.
Dartmouth College vs. Woodward, 4 Wheat 518.
Second Kent's Commentaries, 10.

Fourteenth Amendment.

This amendment was not designed to interfere with the exercise of the police power by the States.

It does not undertake to withdraw from the States their inherent power to prohibit or regulate trades and occupations which are or may be unwholesome, or of regulating the use of property so as to guard against a use which is injurious to the community.

Davis vs. Massachusetts, 167 U. S. 43, 47.
Slaughter-house Cases, 16 Wall 36, 62, 81.
Powell vs. Pennsylvania, 127 U. S. 678, 683.
Holden vs. Hardy, 169 U. S. 366, 392

The courts have wisely left to the Legislature the right to exercise its discretion in matters pertaining to police and, if the object is conducive to the public interest, the Legislature has an unrestrained choice not only in the subject matter but in the means employed.

Lawton vs. Steele, 152 U. S. 133, 136, 140.

Powell vs. Pennsylvania, 127 U. S. 678, 685, 686.

Crowley vs. Christensen, 137 U. S. 86, 89.

Gundling vs. Chicago, 177 U. S. 183, 188.

2 Tiedeman, State & Federal Control of Persons & Property (1900), p. 730, Sec. 145.

Conclusion.

We have endeavored to call the attention of the court to long established rules and, in view of these rules and because these rules are well known, we have asked that the judgment of the lower court be affirmed.

The principle is well stated in the third head note of the decision of the Court of Appeals. We adopt this language of the decision and express it as a principle of law that has been and, we believe, will be universally accepted:

> "As a general rule the power of a municipality to control its police department is inherent and exclusive, and the imposition of regulations by which interference therewith is prevented or prohibited cannot be said to be an unreasonable exercise of municipal power, although by the passage of ordinances having that effect it becomes impracticable for a private person to carry on the business of a private detective. In the case of such a conflict, salus populi est suprema lex."

Respectfully submitted,

James L. Mayson,

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Counsel for Defendant in Error.

FILED
SEP 28 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 103

DAN S. LEHON, *Plaintiff in Error,*

vs.

CITY OF ATLANTA.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

RESPONSE TO THE MOTION TO DISMISS OR AFFIRM

JOHN D. LITTLE, ARTHUR G. POWELL, MARION SMITH, AND MAX F. GOLDSTEIN, ATTORNEYS FOR THE RESPONDENT, DAN S. LEHON

JOHNSON-DALLIS CO. PRINTERS. ATLANTA

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Pending the briefing of the case in chief on the part of the plaintiff in error, notice of a motion on the part of the defendant in error to dismiss or affirm has been served.

For response the plaintiff in error asks leave to submit its brief in the main case.

An examination of this brief, as well as of the record in the case, will show that at least three, and probably more, distinct substantive federal constitutional questions are squarely raised by the record and the assignments of error. An examination of the record will show that the reason assigned by defendant in error as to why the plantiff in error cannot urge these constitutional questions is not well taken.

These questions are, it is respectfully submitted, neither so shallow nor so easy of disposition as the motion of the defendant in error and the brief in support thereof, seems to assume.

These questions are certainly not frivolous; the constitutional rights asserted are highly important. It has been the intention of counsel for the plaintiff in error to eliminate from the presentation of this case in this Court everything extraneous to the pure constitutional questions involved, but we believe it will be no material departure from this purpose to say that no man can read the record in this case without shock, and without surprise that this case could have arisen in a free government or in any community professing regard for individual rights and liberties.

The imputation that this writ of error was filed for delay only will hardly be indulged in view of the fact that the plaintiff in erorr moved to advance it for hearing at earliest opportunity.

The accompanying brief, which states the questions involved and the law points relating thereto are submitted as a part of this response, and reference to the same, as such, is prayed.

Respectfully submitted,

John D. Little,

Arthur G. Powell,

Marion Smith,

Max F. Goldstein,

Attorneys for Respondent.

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THE CITY OF ATLANTA.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

BRIEF OF JOHN D. LITTLE, ARTHUR G. POWELL, MARION SMITH and MAX F. GOLDSTEIN,
Attorneys on Behalf of the Plaintiff in Error.

ABSTRACT OR STATEMENT OF THE CASE.

THE QUESTIONS PRESENTED.

The questions involved are as follows:

(1) Whether, as against the due process clause and the equal protection clause of the federal constitution, a municipality can abolish the occupation of a private detective, by requiring all private detectives to make application for a permit to the police commission of the city, obtain the approval of the chief of police, take the oath of the members of the police force (which oath binds them to make

arrests and perform all the other duties of public police officers of the city) and work under police supervision, thereby fully converting them from private detectives into public police officers.

(2) Whether a municipal ordinance of the character above described is constitutional where it is construed by the municipal authorities and the highest state court having jurisdiction to pass on the question as including in the word "detective" a person who being an office manager of a detective agency merely looks after office details, the employment and paying of operatives, and the assisting of counsel in the preparation of a motion for a new trial in a criminal case by interviewing witnesses, and who does no sleuth work, and exercises no function of a police or peace officer.

(3) Whether such an ordinance can be constitutionally enforced against a citizen of the State of Louisiana, by punishing him for doing only the acts mentioned above, when under the ordinances in question it is unlawful for any one to act as a private detective except upon his qualifying as a peace officer or public detective, and when the only municipal board qualified to issue the preliminary permit and the chief of police who must approve have both construed the ordinances as allowing only residents of the State of Georgia to receive permits, and have enforced the construction by uniform rule and practice; and when there is a statute making it criminal for any one other than a citizen of the State to act as a public "peace officer or detective."

(4) Whether one who is a citizen of another state but who does not act as a peace officer or public detective, but does only acts of a private nature in the line of an ordinary occupation having no connection with the duties of a public office is precluded from raising the question that

the ordinances referred to above, as construed by the local authorities and the highest state court having jurisdiction to pass on the same, discriminate against him by denying to him privileges which the ordinance and statute referred to confine to citizens of the state, because he carried on the private business referred to without applying for the permit or approval required by the ordinance, it appearing that the municipal authorities are enforcing the ordinance against him by fine or imprisonment, and it also appearing that the accused's employer had been informed in advance by the municipal authorities that none of his non-resident employees could be given permits; and that there is a state statute which would have made it criminal for him to complete his application.

(5) Whether as against the due process clause, and the equal protection clause of the federal constitution an ordinance which makes it penal for a private detective to work except with the approval of the chief of police and under police supervision, can be enforced under the circumstances of the particular case, to-wit: one Frank had been convicted for murder; an extraordinary motion for a new trial was pending; the chief of police and the police force under him were assisting in the prosecution of the case; the defendant Frank and his counsel were charging the chief of police and the members of the force with having procured evidence for the prosecution by illegal and criminal methods; the plaintiff in error acted as office manager for a detective agency employed to investigate the alleged illegal and criminal activities of the police officers, and besides exercising his managerial duties he also interviewed some of the witnesses and assisted counsel in the preparation of the motion for a new trial; and it appears that these services could not have been performed, if the ordinance were obeyed, for the obvious reason of the patent incompatibility of working in behalf of the defense and against the police officers, and yet working with

the approval and under the supervision of those very officers who were working in behalf of the prosecution, and whose illegal and criminal activities were the subject matter of the investigation. This question also involves the constitutional right of the defendant Frank to have his assistance in his defense and not to be required to subject his defense to the approval and supervision of his prosecutors, and, as a corollary, the right of the present plaintiff in error to be employed to do the work which Frank had the constitutional right to have done for him.

HOW THE QUESTIONS ARISE.

These questions are involved and the manner in which they are raised is as follows:

Lehon, the accused, was convicted in the recorder's court of the City of Atlanta for a violation of Sections 2024, 2025, 2026 and 2027 of the City Code of Atlanta for "carrying on a private detective agency in said city and doing the business of a private detective without a permit therefor and without being passed upon as required by said ordinances, and in that he did the business of a detective, without being approved by the chief of police or board of police commissioners as required by the sections of the city code cited above" (transcript, p. 2).

THE ORDINANCES IN QUESTION.

Copies of the sections of the city code in question are in the record (transcript, pp. 35, 36) and are as follows:

> "Sec. 2024. **Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision.**—No person, firm, company or corporation shall carry on or be engaged in the business of a private detective or detective agency, unless such person, firm, or corporation has been first recommended for license or per-

mit for such detective business or agency by the Board of Police Commissioners of said city; but in all cases in which such recommendation is made and certified by the Board of Police Commissioners to the Clerk of Council, a license or permit shall be thereupon issued for such business. When so licensed, the licensee shall take the oath of a city detective, and be subject to police supervision. Any person, firm or corporation who shall be hereafter engaged in the business of a detective or detective agency in said city, outside of the police force of said city, and without a license issued as hereinbefore provided for, shall be punished by a fine of not exceeding five hundred dollars, or imprisonment for not exceeding thirty days, either or both, in the discretion of the Court."

Sec. 2025. Detective Agency—Bond Required—Use of Persons Injured By.—All persons, firms or corporations, licensed under authority of the Mayor and General Council, for the purpose of operating a detective agency, or following the occupations of detective, shall give a bond in the sum of $1,000, payable to the City of Atlanta, for the use of any person, firm or corporation, injured or damaged on account of any illegal act of such agency or detective or persons employed as detectives by such licensed agency, or detective or any employee in and about their business licensed as aforesaid."

Sec. 2026. Penalty.—Any person, firm or corporation carrying on a detective agency or following the occupation of detective, without giving bond as required in the foregoing section, shall, on conviction in the Recorder's Court, be punished by a fine not exceeding $500.00 or sentenced to work on the streets or public places of the city, not exceeding thirty days, either or

both penalties to be inflicted in the discretion of the Recorder."

"Sec. 2027. **Certificate as to Character.**—No detective agency now or hereafter licensed by the City of Atlanta, shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by the Board of Police Commissioners, and the Chief of Police, and a certificate to that effect lodged with said agency."

"Sec. 2028. **Penalty.**—Any detective now or hereafter licensed by the City of Atlanta that sends out any person or agent to do detective work without the approval provided in preceding section of this ordinance shall thereby forfeit the license granted for such agency, and if it thereafter continues said detective agency, any person, agent or officer or manager of such agency shall, on conviction in the Recorder's Court of a violation of this ordinance, be fined for each day's operation as a separate offense, not exceeding two hundred dollars, or imprisoned not exceeding thirty days, or forced to work upon the public works not exceeding thirty days, either or all of such penalties to be inflicted in the discretion of the Recorder."

STATE STATUTE IN CONNECTION WITH WHICH ORDINANCES ARE TO BE CONSTRUED.

These ordinances are to be taken in connection with Sections 337 and 338 of the Penal Code, (1910) of the State of Georgia, as follows:

"Sec. 337. **Appointment of Peace-Officers and Detectives.** No sheriff, mayor, or other person authorized by law to appoint special deputy-sheriffs, constables, marshals, policemen, or other peace-officers or detect-

ives, to preserve the public peace or detect crime, shall appoint, as such special deputy, special constable, marshal, policeman, or other peace-officer or detective, any person who is not a citizen of this State, and no person shall assume or exercise such functions, powers, duties, or privileges incident and belonging to the office of special deputy-sheriff, special constable, marshal, or policeman, or other peace-officer or detective, without first having received his appointment in writing from the lawfully constituted authorities of the State.

"Sec. 338. **Acting as Peace-Officer Without Authority.** Any person who shall, without authority, exercise or attempt to exercise the functions of, or hold himself out to anyone as, a deputy-sheriff, marshal, policeman, constable, or other peace-officer or detective shall be guilty of a misdemeanor; Provided, that nothing in this Article shall be construed to interfere with the police powers granted to conductors of passenger trains. Nor shall this and the preceding section apply in times of riot or unusual disturbance, or in other instances provided for by law."

The accused filed a special plea setting up the unconstitutionality of the ordinances. The trial court struck the special plea on general demurrer to the same on the ground that it was insufficient in law. (Transcript, p. 2).

The accused thereupon followed the statutory method of review, that is by presenting a verified petition for certiorari to a judge of the Superior Court, and, upon his endorsing refusal of sanction thereon, taking bill of exceptions and writ of error to the Court of Appeals. The Court of Appeals affirmed the judgment. Under the Georgia practice when this proceeding is taken, the facts stated in the verified petition for certiorari are judicially taken as the truth of the case; hence the case may be considered

as being here on undisputed facts; and this is especially true where the trial court struck the special plea on general demurrer, it being presumed in such cases that if the plea had not been stricken and the accused had been given opportunity to do so he would have proved all the facts as pleaded, and that therefore, for the purposes of the questions involved, the opposite party admits all facts stated in the plea to be true. (For a statement of the practice and the presumption as to the truth of the case as claimed by the accused, see Linder vs. Renfroe, 1 Ga., App. 58; Marks vs. State, 8 Ga. App. 283.)

THE FACTS.

The facts briefly stated are as follows:

Lehon was a resident of Louisiana, being the manager of the Southern Division of the Wm. J. Burns National Detective Agency, with headquarters in New Orleans. That Agency was duly licensed in Atlanta, the license being taken in the name of one Sears, a citizen of Atlanta, it being understood, however, at the time that he was taking it as local manager of the Burns Agency, (Transcript, pp. 11, 13, 22, 36, 37, 39).

Lehon came to Atlanta to assist the Burns Agency in the defense of one Leo M. Frank, charged with murder; the work he did being the general supervision of the local office, the employment of operatives, and the checking up with the witnesses certain testimony alleged to have been given by them in connection with the case, and to give assistance to defendant's counsel in the preparation of the case.

He exercised none of the functions of a police officer; nor any of the sleuth work of an operative detective.

He did not apply for or secure the approval of the chief of police or the police board, nor did he report to the chief of police as required by the ordinances.

THE OATH REQUIRED BY THE ORDINANCES.

He did not, therefore, take the oath prescribed in Section 2024 of the city charter, which oath is found in the charter of the City of Atlanta (an act of the general assembly of the State of Georgia of which the courts take cognizance) i. e., in Georgia Laws 1874, p. 135, section 37, which is to be taken in connection with section 38 of the same statute, as follows:

> "Sec. 37. They shall take an oath, faithfully and impartially to discharge the duties imposed on them by the laws of the State, and the ordinances of the City, and shall give such bonds as may be required of them by the City ordinances."
>
> "Sec. 38. It shall be their duty to make arrests of any persons violating the ordinances of said City, with or without summons, and also with or without warrant. They shall likewise make arrests of any persons who have violated the statutes of said State, and their arrests for such violations are hereby authorized, either with or without warrants therefor. They shall perform such other duties as may be imposed by the laws of the State, and ordinances of the General Council."

SUMMARY OF THE SPECIAL PLEA.

This special plea made the point that the ordinances are void on the following grounds in substance, (omitting those which do not involve federal constitutional questions):

That the right to act as a private detective or to run a detective agency is a valuable property right, also a right of personal liberty, and this is especially true when the activities are employed on behalf of one accused of crime; that the ordinances, when construed together, absolutely

prohibited the occupation; and that this was especially true as to the activities for which he was being tried, namely acting as an investigator on behalf of one accused of crime where the police force of the city were prosecutors and where the particular matter under investigation was the alleged illegal and criminal methods used by the police in the procurement of evidence in that case; and that the requirement that he should take the oath of a policeman, be approved by the chief of police and work under police supervision, and report to the chief of the police would render his task impossible.

That he is a citizen of Louisiana, and that under the ordinances, taken in connection with the State law, and as construed by the police commission, under an unbroken practice of that board, he could not be given a permit because the board had ruled and had enforced the ruling, that none but citizens of Georgia could be licensed as private detectives. That the ordinance was, therefore, void as depriving him of liberty and property without due process of law, denying him equal protection of the laws, and refusing to him as a citizen of Louisiana privileges and immunities granted to citizens of Georgia. These same points in substance arise under the evidence.

THE UNDISPUTED FACTS.

There is no dispute or contradiction in the record as to these facts.

The accused acted only as a private detective, i. e., as one who did office work in checking up the reports of operative detectives and who in some cases in person interviewed and obtained statements from witnesses. His chief duty was to assist defendant's counsel in the preparation of the evidence in the case of Leo M. Frank (transcript, p. 18).

That the accused did not act or assume to act as a pub-

lic detective. He did not exercise or assume to exercise any function as a police officer or as a peace officer.

That the accused is a citizen of Louisiana.

That the police commissioners of the City of Atlanta have construed the law as prohibiting them from granting any permit, license or recommendation to any detective, public or private, unless he be a citizen of Georgia. This is admitted by the demurrer to the special plea (see transcript, p. 34) and is shown by the testimony of the police commissioners themselves (transcript, pp. 21-23). The testimony of the chief of police shows that he likewise construed the ordinances (see transcript, pp. 18, 19).

That while the accused had not personally made application to the commissioners for a permit or to the chief of police for his approval as a private detective, the Burns Agency of which he was an employee, had been notified in advance of the board's construction of the ordinances, and of the fact that no permit could be issued to him unless he became a resident of the City of Atlanta. (See Exhibit "H" to the testimony, transcript, pp. 38-41, and testimony of commissioner Johnson, transcript, pp. 22, 23.)

That the chief of police and the other members of the police force of the City of Atlanta were actively assisting the prosecution in the case of Leo M. Frank.

That one of the principal matters involved in the investigations being made by and under the direction of the accused was certain alleged illegal and criminal methods that had been used by these police officers in procuring evidence for the State.

That compliance with the ordinances would have rendered the performance of this service futile, if not impossible, since the ordinances required the disclosure to the chief of police of the activities of all private detectives and required them to work under the supervision of the police. It is obvious that an investigation of illegal and criminal practices of the chief of police and his police officers could not be made effectively under the supervision of the very

men who were accused of the illegal and criminal practices; and it is so alleged in the special plea and shown in the evidence.

The exceptions to the overruling of the special plea, and the other exceptions made by the assignments of error in the petition for certiorari present certain constitutional questions, which, however, are so far as this court is concerned, set out in the assignments of error presented in connection with the writ of error from this court, and which therefore are not repeated here.

THE HOLDING OF THE STATE COURT OF APPEALS.

The Court of Appeals held:

That the ordinances do not conflict with either state or federal constitution.

That although the ordinance had the effect to make it impossible for any private person to carry on the business of a private detective, the ordinance was nevertheless valid, on the ground that the municipality had the power to prevent interference with its police department.

That irrespective of the terms of his employment a detective is in essence a quasi police officer, and subject to municipal control.

That the right of the municipality in these respects is superior to the property right of the individual to engage in the occupation, and that, therefore, to prohibit the occupation is not to deprive the individual of property or liberty in violation of the due process of law clause of the federal constitution or to deny him the equal protection of the laws.

That the court would not pass upon whether the police commissioners could grant a permit to a non-resident, nor upon the question as to whether the uniform rule and practice of the police commissioners in refusing permits to non-residents discriminated against the plaintiff in error

as a citizen of Louisiana, since he had not made application for a permit.

That under the evidence his activities were such as to make him a detective within the purview of the ordinance.

SPECIFICATON OF THE ERRORS RELIED UPON.

The following errors are relied upon:

I.

That the Court of Appeals of the State of Georgia erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari presented by the plaintiff in error, seeking to review and set aside the conviction of the plaintiff in error in the recorder's court of the City of Atlanta, on the ground that the ordinances of the City of Atlanta were and are void and unconstitutional in that the enforcement of said ordinances deprived said plaintiff in error of his liberty and property without due process of law, and also in that they denied to him the equal protection of the laws, (thereby being repugnant to the fourteenth amendment of the Constitution of the United States) and in that the enforcement of said ordinances denied to plaintiff in error, who was a citizen of the State of Louisiana, privileges which were allowed to citizens of the State of Georgia, namely the privilege of engaging in the work of a private detective, (thereby being repugnant to and violative of paragraph 1, section 2 or article 4 of the Constitution of the United States) and that the decision and judgment of the Court of Appeals of Georgia was, therefore, violative of and repugnant to the Constitution of the United States, and especially the portions thereof referred to above.

II.

The said court erred in holding and adjudging that the municipal ordinances of the City of Atlanta under which the plaintiff in error was convicted in the recorder's court of the City of Atlanta were not and are not, as applied to the plaintiff in error in the present case, unconstitutional, null and void because they were and are repugnant to and violative of the fourteenth amendment of the Constitution of the United States for the reason that the said ordinances and the enforcement thereof deprived the plaintiff in error of his liberty and property without due process of law, and denied to him, as a person within the jurisdiction of the State of Georgia, the equal protection of the laws.

III.

That said court erred in holding and adjudging that the making and enforcement of the municipal ordinances of the City of Atlanta under which the plaintiff in error was tried and convicted in the recorder's court of the City of Atlanta were not and are not violative of and repugnant to paragraph 1, section 2 of article 4 of the Constitution of the United States which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

IV.

That the said court erred in holding and adjudging that no defense was presented by special plea filed by the plaintiff in error in the recorder's court of the City of Atlanta, wherein the plaintiff in error specifically set up and pleaded that the ordinances of the City of Atlanta under which he was accused were unconstitutional, null and void in that they deprived him of his liberty and property without due process of law, and denied him the equal protection of the

laws, also in that they deprived Leo M. Frank, the person on whose behalf the plaintiff in error was acting in the transaction for which he stood charged, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; also in that they abridged the privileges and immunities of plaintiff in error who was a citizen of the State of Louisiana, and of the United States, in that said ordinances denied to him the privileges and immunities enjoyed by citizens of the State of Georgia likewise circumstanced; and also that the enforcement of said ordinances, under the facts in said special plea recited, (and by the demurrer thereto admitted to be true), deprived the plaintiff in error and also said Leo M. Frank, for whom he was acting as aforesaid, and each of them, of their liberty and property without due process of law, and denied to each of them the equal protection of the laws and abrigded the privileges and immunities of plaintiff in error as a citizen of the United States and discriminated against him as a citizen of another State by refusng to him the privileges to which the citizens of the several States were entitled and which in the enforcement of said ordinances were so limited as to be enjoyed only by citizens of the State of Georgia, and in adjudging and holding that said special plea was insufficient in law; and that the said Court of Appeals erred in sustaining the action of the recorder of the City of Atlanta in striking and dismissing said special plea as being insufficient in law.

V.

That said court erred in holding and deciding that the right guaranteed to the plaintiff in error by paragraph 1, of section 2 of article 4 of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states," had not been denied to him in the enforcement of the ordinances of the City of Atlanta

under which he was tried and convicted in the recorder's court of the City of Atlanta; notwithstanding he was charged with having acted as a private detective in the City of Atlanta without having been approved by the Chief of Police of said City of Atlanta and without a permit from the Police Commissioners of said city, and it appeared that the plaintiff in error was a citizen of the State of Louisiana, and that under the views of the law as held by the Chief of Police of Atlanta, he approved only citizens of Georgia as private detectives, and under the views of the law was held by the Police Commissioners, and their uniform course of practice, said Commissioners granted permits only to citizens of the State of Georgia to act as private detectives.

VI.

That the court erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari of plaintiff in error, brought to review and reverse the judgment of the recorder of the City of Atlanta, convicting him of violating the ordinances of said city by carrying on a private detective agency and doing the business of a private detective in that the court held that the acts shown by the evidence to have been done by the plaintiff in error (in substance that he as a managing agent or supervisor of a private detective agency, which through another agent had been duly licensed and granted a permit to do business in Atlanta assisted the defendant in a criminal case and his attorneys in the preparation of an extraordinary motion for a new trial, by openly, and not secretly, interviewing the witnesses who had made and who were about to make affidavits for use in said case, and by acting as a go-between or as a channel for conveying information to and from the defendant's counsel and the detective operatives employed on the case by the employer of the plaintiff in error) came within the purview of the said ordinances, and in that the court, in connection with

this construction of the ordinances, held that the ordinances so construed and enforced against said plaintiff in error did not deprive him of his liberty and property without due process of law.

VII.

That the court erred in holding that the ordinances of the City of Atlanta under which the plaintiff in error was convicted are not and were not void and unconstitutional as supplied to the transaction for which the plaintiff in error was convicted, in that they deprived the plaintiff in error of his liberty and property without due process of law and denied the equal protection of the laws to him, and also in that they deprived the person for whom plaintiff in error was employed and acting, namely Leo M. Frank, a prisoner charged with and convicted of murder with a motion for new trial pending, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; and in sustaining the enforcement of said ordinances against the said constitutional provisions, notwithstanding that it became necessary and important to the defense of said Leo M. Frank against the charge aforesaid that he employ said plaintiff in error to perform for him the services which said court held to constitute engaging in the business of a private detective within the purview of said ordinances, and notwithstanding it appeared that the Chief of Police of Atlanta (whose approval under said ordinances was a condition precedent to the plaintiff in error being permitted to perform said services and under whose supervision the plaintiff in error would have been compelled to perform said services, if he had complied with said ordinances) was prosecutor in the said case against said Leo M. Frank, so that said services could not have been performed for said Leo M. Frank if the plaintiff in error had complied with said ordinances, and notwithstanding the effect of said ordinances was to com-

pel the defense in said case of Leo M. Frank to disclose its activities in preparing its evidence to the prosecutor without requiring the prosecution to make like disclosure to the defendant; and especially so since the chief object and need of the employment of the plaintiff in error was to prepare the evidence as to alleged illegal methods used by said Chief of Police, the prosecutor, and those working under him in procuring and presenting evidence against said Leo M. Frank in said matter.

ARGUMENT.

ANALYSIS OF THE ORDINANCES.

Notwithstanding the circuitous route taken by the ordinances in question to reach the end in view, their object and purpose are frankly stated in the title to the first of them (City Code, Section 2024) as follows: "Detective Agency Business Abolished".

The abolition of the business of private detectives is accomplished by requiring a license or permit from the police commissioners and by requiring the licensee to take the oath of a city detective and to be subject to police supervision. This ipso facto and at once converts the private detective from a private detective into a police and peace officer of the city. A reading of the oath, and the statement of the duties thereby assumed, both of which are set out in full in the preceding statement of facts show undoubtedly that this is correct.

The meaning and effect of the ordinances would have been exactly the same if it had been directly enacted under penalty that "none but public officers of this city who are appointed, licensed or permitted by the Board of Police

Commissioners, and who have taken oath as such and duly given bond, and who work under police supervision shall do the work hitherto done by private detectives and private detective agencies, and all other persons are forbidden to follow the occupation of a private detective."

DEFINITION, BY CONSTRUCTION, OF THE WORDS, "PRIVATE DETECTIVE."

The phrase "private detective" has no clearly defined meaning, but for the purposes of this case it has been defined to the extent that it includes one who exercises no public function, who exercises none of the functions of a peace or police officer, but who only does managerial office work, interviews witnesses and reports to counsel—the work of an ordinary investigator; in fine, the same character of work that the chief claim agent of a railroad company or other corporation would do—because this point was expressly made that these activities did not constitute one a private detective within the purview of the ordinances, and was decided against by the Court of Appeals of Georgia.

THE OCCUPATION, AN ORDINARY LAWFUL CALLING.

The occupation of private detective, especially as defined in this case, is a lawful calling. It is so in its nature, and is so recognized by the statutes of Georgia. The general tax act of the State of Georgia, found in Civil Code of Georgia (1910) section 931 taxes it as an ordinary occupation in the following language:

> "Upon each and every person doing detective work, or engaging in the business of a detective for hire or compensation, the sum of ten dollars for each located office established in this State, and if no established office, then said tax shall be required in each county in

this State wherein any detective may do or offer to do detective work."

In Georgia the taxing of a business in the general tax act carries the conclusive implication that it is a lawful occupation. Miller vs. Shropshire, 124 Ga. 829.

> "The general tax acts * * * * are purely revenue measures, though enforceable by penalty for failure to pay the imposed tax, as distinguished from police measures designed to regulate internal affairs."
>
> Miller vs. Shropshire, Supra., p. 832.

The right to engage in the business of a private detective is in its very nature a valuable property right—a reputable means of earning a livelihood.

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may chose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one in like conditions. The interest, or as it is sometimes termed, the estate acquired in them, that is the right to continue their prosecution is often of great value to the possessor, and cannot be arbitrarily taken from them any more than real or personal property can thus be taken."
>
> Dent vs. West Virginia, 129 U. S. 114, 121, 32 L. Ed. 623, 625.

See also the valuable monographic note appended to the case of State vs. Hinman, 65 N. H. 103, as reported in 23 Am. St. Rep. 22, 25.

The occupation pursued by the plaintiff in error, as characterized by the acts he did, call it what you may, is a plain, common ordinary business.

> "There is no magic in language, though used by a constitutional convention, which can change a private business into a public one. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare by organic act or legislative ordinance that such place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors by giving them a new designation." Per Mr. Justice Field, dissenting in Munn vs. Illinois, 94 U. S. (4 Otto) 113, 24 L. Ed. 77, 88.

The ordinances here involved are not regulations of a business, but as has been pointed out are absolute prohibitions.

THE CONSTITUTIONAL RIGHT TO FOLLOW A LAWFUL CALLING.

The right to pursue any lawful calling is, of course, a right protected by the federal constitution.

Allgeyer vs. Louisiana, 165 U. S. 578. 41 L. Ed. 832.

There is no intention on the part of the plaintiff in error to argue that the State cannot regulate business, or in some cases abolish or suppress occupations or create monopolies in certain occupations, or that the consent of some board or officer may not lawfully be made a condition precedent to individuals engaging in certain businesses.

We understand the rule to be that the fourteenth amendment of the federal constitution guarantees the citizens against arbitrary spoliation of property rights in private occupations, and guarantees equal protection to all simi-

larly situated; that no general and unlimited power resides in the State legislative bodies to regulate purely private business, except wherein it is affected with some public interest; that the means employed must not be unreasonable and unnecessary to the accomplishment of such lawful purpose as might justify legislation on the subject; that the interference with private business must not be arbitrary; that while the State may as to some occupations create a monoply this does not relate to purely private occupations; that in all cases the exercise of the police power is subject to the supervision of the courts.

Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220;

Dobbins vs. Los Angeles, 195 U. S. 223, 49 L. Ed. 169;

Lawton vs. Steele, 152 U. S. 133-137, 38 L. Ed. 385 388.

"The State has undoubtedly the power by appropriate legislation to protect the public morals, the public health and the public safety; but if, by their necessary operation, its regulations looking to either of these ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Connally vs. Union Sewer Pipe Co., 184 U. S. 540. 558, 46 L. Ed. 679.

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of action of purely personal and arbitrary power."

Yick Wo vs. Hopkins, 118 U. S. 356, 369, quoting ap-

provingly in Chicago M. & St. P. Ry. Co. vs. Tompkins, 176 U. S. 167, 172, 44 L. Ed. 417.

"It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises are subject to investigation in the courts with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

Dobbins vs. Los Angeles, 195 U. S. 223, 236, 49 L. Ed. 169.

"But this concession (that certain businesses may be regulated) does not in the slightest degree affect the proposition, which I deem a fundamental one, that the ordinary pursuits of life, forming the large mass of industrial vocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects, the liberty of pursuit."—Concurring opinion in Butchers Union Co. vs. Crescent City Etc. Co., 111 U. S. 746, 763; 28 L. Ed. 585, 589.

THE ORDINANCES, NOT AN EXERCISE OF THE POLICE POWER.

Even though the subject be one as to which the exercise of the police power is legitimate, the exercise must be had with due regard to constitutional rights and the regulation

must have relation to the end for the accomplishment of which the exercise of the police power is authorized. Under the guise of accomplishing some object within the police power the law making body cannot adopt regulations which are not legitimately adapted to that end and which infringe constitutional guarantees.

Vance vs. Vandercook, 170 U. S. 438, 42 L. Ed. 1100.

Whatever may be the supposed evil arising from leaving private detectives unregulated, the regulation must be directed toward that evil and not something else. If the object be to confine the business to persons of good character, that object is not accomplished by making the detectives take an oath to assume the duties of a public police officer; or by a regulation which confines the business to residents of the State. The question of the proficiency of a private detective would seem to be a matter in which the public is not concerned and with which only the private detective and his employer are concerned; but even if it is, the regulation in question is not designed to that end, except in the minor detail that no detective agency shall employ a private detective unless the latter's proficiency is approved by the chief of police. The detective agency probably would be a better judge of what type of man it needed than the chief of police. The activities of private detectives might be curbed by uniform regulations, but it is arbitrary to curb them by the requirement that regulates them only by putting them under the undefined, unrestricted, supervision and control of the police commission and the chief of police of the city.

When the ordinances are construed as a whole, especially in connection with the state statute with which they must be construed, and are carefully studied to ascertain the object in view in their passage, the conclusion irresistably forces itself on the practical mind that the only intent and purpose (theoretical or practical) of the ordinance was to

drive out of the business all detective agencies which would not co-operate with the police of the city, and do the bidding of the police authorities; first, by providing for police approval, then for the putting of every detective under the oath of allegiance, then for subjecting his activities to police supervison; also to exclude all non-residents from the business. The ordinances cannot fairly be construed as compatible with any other legislative design. And the evidence discloses that in practical operation they were given that effect.

If the phrase "private detectives" had been construed by the state authorities as including only those who exercised some function likely to affect public safety, good order or morals, the ordinances, on their face, (oppressive as they are) might not be so unreasonable or arbitrary as to justify judicial interference. For instance, private persons are sometimes employed to act as guards for individuals who are in danger of private violence, or as protectors of property in case of strikes, etc., and they undertake to make arrests for offenses committed in their presence, and to perform other services akin to those pertaining to peace and police officers. To place such activities under police supervision might be reasonable.

But here the occupation pursued has no relation to public safety, good order or morals or any of the other wards of the police power. The state authorities and the State Court of Appeals construe the ordinance as including this occupation. To regulate this business by the abolishment of it, and to transfer the sole right to pursue it to those licensed, sworn and supervised as public police officers, would seem to be purely arbitrary; it would appear that the regulation is neither reasonable nor necessary to any object legitimately to be accomplished in the exercise of the police power; that it creates a monopoly in a purely private business which the State would not have the power wholly to suppress.

MERE DEFINITION CANNOT TAKE AWAY CONSTITUTIONAL RIGHT.

At this point in the argument we call attention to a proposition which is involved not only in the question immediately under discussion, but also in practically all of the other questions in the case:

The proposition is, that any enactment which is not a legitimate and constitutional police regulation cannot be made such by being placed in the same act with a police regulation or by being enacted in a context which professes a purpose which would be the proper object for the exercise of that power.

Coppage vs. Kansas, 236 U. S. 1; 59 L. Ed. 441.

In the Coppage case, just cited, the Kansas statute professed to be an act to penalize the coercion of employees. The act penalized the coercion by employers or would-be employers of employees or applicants for employment as to agreeing not to join labor union as a condition to the employment or continuing in the employment.

The Kansas Court held that one who presented to his employee a written agreement to withdraw from a labor union, but left it optional with the employee whether he would sign or quit work was guilty under the act. The United States Supreme Court, held that the fact that the statute uses the word "coerce" or that the Kansas Supreme Court stresses that word in its opinion is immaterial; that since the state court treated the term "coerce" as applying to the only activities engaged in by the accused, the effect was to construe the statute as including these activities and to enforce it so as to prohibit them; "there being no finding nor any evidence to support a finding that the plaintiff in error was guilty in any other sense," that the Court would examine the evidence to the extent necessary in order to determine the federal question asserted.

The Court also said:

> "If the right that the plaintiff in error exercised is founded upon a constitutional basis, it cannot be impaired by merely applying to its exercise the term 'coercion'."

The court again reiterates, "to avoid possible misunderstanding," that the purpose declared in the title of the acts is immaterial—that "this court deals not with moot cases of abstract questions, but with the concrete case before it."

The court declared the statute unconstitutional as applied to the transaction in question.

Now in the case at bar we contend that under the guise of regulating peace and police officers, the municipal legislative body could not include in the enactment one who pursued an ordinary avocation having no relation to the functions of peace or police officers by calling him a "detective;" that the Court of Appeals having held that a detective is a peace officer "whatever may be the terms and purposes of his employment;" and "there being no finding nor evidence to support a finding that the plaintiff in error was guilty in another sense" than that he engaged in the non-public activities referred to; and the entire evidence being in the record, the Court will examine it to the extent necessary in order to determine the Federal right that is asserted; and that if the right that plaintiff in error exercised is founded upon a constitutional basis, the Court will protect it against impairment, notwithstanding its inclusion by the State authorities or courts in a false definition, or in an enactment which as to activities of another nature may be valid exercise of the police power.

THE DISCRIMINATION AGAINST PLAINTIFF IN ERROR ON ACCOUNT OF HIS CITIZENSHIP.

Thus far we have discussed the ordinances without regard to the question of discrimination between residents and non-residents, because the present case is a test case on which certain other cases depend in which the question of non-residence is not involved.

When we go a step further and get to the real object and result of the ordinance, namely, to prohibit all but residents of Georgia from doing private detective work of all kinds, the invalidity of the ordinance becomes, we submit, perfectly clear.

The State can of course prescribe that none but residents can hold public office in the State; but it is respectfully insisted that the State cannot lawfully prescribe that none but its own citizens who are public officers can carry on a purely private business.

For example, shoemakers are frequently justices of the peace, and vice versa. The State may lawfully prescribe that none but its own citizens may be justices of the peace; but it cannot then, without violating paragraph 1, of section 2 of article 4 of the Constitution of the United States, go further and prescribe that none but justices of the peace may be shoemakers.

The State of Georgia, through sections 337 and 338 of the Penal Code of 1910 (quoted in full in the abstract and statement of facts incorporated in this brief) has provided that none but citizens of the State may exercise any of the functions of "deputy-sheriffs, constables, marshals, policemen, or other peace officers or detectives, to preserve the public peace or detect crime". The word "detective" used in this statute, by its association, plainly means "public detective"; and, as this word, as used in this statute, has never been otherwise construed by the Georgia courts, we assume this court will adopt that construction. So construed, this statute is conceded to be lawful. But when,

following this statute, the city of Atlanta enacts that no one shall follow the occupation of private detective (and includes in the enactment by construction the purely private activities involved in the present case) who is not licensed and sworn as a public police officer working under police supervision, the unlawful discrimination against the non-resident is at once effective.

To state the proposition a little differently and in the concrete: Lehon is a citizen of Louisiana, under the protection of the constitutional guarantee that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; he is a managerial officer in a detective agency, performing purely private functions; he wishes to pursue his business in Atlanta in the State of Georgia; in attempting to do so he finds a local ordinance that for him to do so he must first become a public officer and be appointed and qualified as such, and must perform his businesses as such; he also finds a statute of the State of Georgia making it criminal for him to become such an officer by reason of his non-residence; citizens of Georgia may qualify to pursue the occupation, he may not because he is a citizen of another state. The discrimination intended by the ordinance, though somewhat indirectly effectuated, is nevertheless perfectly patent and well accomplished except for the constitutional guarantee which avoids the ordinance.

> "It is undisputably the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions."
>
> Dent vs. West Virginia, 129 U. S. 114, 121, 32 L. Ed., 623, 625.

> "In all cases of the class to which this one before us

belongs it is a test question whether there is any discrimination in favor of the State or of citizens of the State which enacted the law. Whenever there is such discrimination it is fatal."

Howe Mach. Co. vs. Gage, 100 U. S. 676, 25 L. Ed. 755, 756.

Even in the exercise of the police power there must be no discrimination between residents and non-residents.

Webber vs. Virginia, 103 U. S. 344, 26 L. Ed. 565.

Even as to intoxicating liquors the rules applies.

Walling vs. Michigan, 116 U. S. 446, 29 L. Ed. 691;

Scott vs. Donald, 165 U. S. 58, 41 L. Ed. 632;

Vance vs. Vandercook, 170 U. S. 438, 42 L. Ed. 1100.

Statute prohibiting a non-resident from being a trustee void.

Roby vs. Smith, 131 Ind. 346, 31 Am. St. Rep. 442, 15 L. R. A. 792.

The principle is recognized in Georgia.

Gould vs. Atlanta, 55 Ga. 678 (1);

Atlanta vs. Jacobs, 125 Ga. 523 (1).

THE PLAINTIFF IN ERROR NOT PRECLUDED FROM RAISING THE QUESTION.

There is no dispute in the record that this discrimination exists, or that the police commissioners, to whom application for permits must be made, or the chief of police,

whose approval is necessary, had uniformly refused permits and approval to non-residents, they having construed the ordinance, taken in connection with the state penal statute on the subject, as forbidding the issuance of permits and approvals to non-residents. Counsel for the City took the position, and doubtless will urge it again, and the Court of Appeals of Georgia in its decision sustained the contention, that the plaintiff in error is not in a position to make the question because he made no application to the police commissioners or to the chief of police for permit or approval. They rely upon the proposition (perfectly sound when properly applied) announced in Gundling vs. Chicago, 177 U. S. 183, and recognized in a number of other cases, that where a statute makes the permit of an officer or tribunal a condition precedent to one's engaging in an occupation, one who has not applied for a permit, cannot make the point that the officer or tribunal is vested with an arbitrary discretion to refuse.

The present case is clearly without the reason given in those cases, and is, we submit, not within the rule.

Here all the valid parts of the ordinance (if any parts were valid) were complied with. The state, county and municipal license taxes were paid by the agency upon whom they were imposed. This puts the plaintiff in error in position to make the question. See—

Campbell vs. Thomasville, 6 Ga. App. 212 (18), 238.

THE STATE LAW MADE IT CRIMINAL FOR THE PLAINTIFF IN ERROR TO COMPLY WITH THE ORDINANCE.

However, the most cogent reasons why the plaintiff in error is excused from attempting to comply with the ordinances are these:

(1) Application on his part would be futile—an idle thing—because the police commission and the chief of police

had a uniform rule and practice, known both to them and communicated to the employer of the plaintiff in error, that no permit would be granted to a non-resident. Tender is always excused when the person to whom the tender is to be made has in advance formed and announced an intention to refuse.

(2) Compliance with the ordinance on the part of the plaintiff in error would have been a crime on his part under the laws of the State of Georgia. The license or permit could not be issued to him unless he contemporaneously took the oath of a city detective; and he could not take the oath (being a non-resident) without violating the provisions of Sections 337 and 338 of the Penal Code of Georgia (already quoted in full); which forbid that any, except citizens of Georgia, "shall assume or exercise such functions, powers, duties or privileges."

The ordinances, read in connection with the State law, embrace a legislative scheme by which no license or permit can be issued to a non-resident. The police commissioners and the chief of police so construed them, and properly so. The ordinances do not in express words forbid a non-resident from applying for a permit; but do enact such a legislative scheme as to forbid such an application.

It is not a case of an ordinance good in part and bad in part, where the bad can be separated from the good, and still leave a sufficiency of the legislative scheme intact to be enforced. If the main and pervading legislative object cannot constitutionally be accomplished, the ordinances fail as a whole, are of no force and effect, and no person is called upon to obey them in whole or in part; and no person should be punished for not obeying them.

VIOLATION OF CONSTITUTIONAL RIGHTS THROUGH THE ENFORCEMENT OF THEM, UNDER THE PARTICULAR CIRCUMSTANCES.

Coming now to the sixth question proposed at the beginning of this brief, we take up the proposition whether the enforcement of the ordinances under the particular circumstances of the present case were not violative of the due process and equal protection clauses of the federal constitution.

A statute, though fair on its face, may not be enforced if under the circumstances of a particular case it would deprive a person of life, liberty or property without due process of law or deny him the equal protection of the laws.

> Yick Wo vs. Hopkins, 118 U. S. 356; 30 L. Ed. 220;
>
> Dobbins vs. Los Angeles, 195 U. S. 223, 240, 49 L. Ed. 169.

To act as investigator for the defense in a criminal case and be under the supervision of the prosecutors in the case; to investigate the illegal and criminal activities of the police under the supervision of those charged with the illegal and criminal activities, are absurdities. To regulate the business of attorneys at law is probably a fair exercise of the police power, but to provide that the attorney for the accused in a criminal case should conduct the defense under the supervision of the prosecuting attorney would be abhorent to our sense of justice, as well as to the federal constitution.

> "Under our system the people, who are the subjects, are the sovereigns. Their rights, whether collective or individual, are not bound to give away to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in

power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered."

U. S. vs. Lee, 105 U. S. 196, 208, 27 L. Ed. 177.

The right to defend one's self against a criminal charge is a right protected by the federal constitution.

The right to defend one's self in the courts involves the right to employ all necessary and legitimate means to make that defense successful; and the right to employ others to assist in the defense, involves as a corrolory the right of those so employed to be employed and to perform the employment.

The right of both the government and of the accused to prepare for prosecution or defense, as the case may be, is an inherent right, and is one which is to be freely exercised without molestation.

In re, Quarles, 158 U. S. 532, 39 L. Ed. 1080.

The Quarles case decides the specific proposition that the right of the citizen to assist in the prosecution of a criminal case is one of his fundamental rights which is within the protection of the constitutional guarantees, but this holding is based on the proposition that the citizen has the same rights as to prosecution that he would have as to defense, and upon the implication that no one would deny that every citizen has the right to defend himself freely in the courts, and to have others to assist him with like freedom and protection,—that these are fundamentals embraced in the very covenant of government.

The proposition that Lehon had the free right to make an adequate and untrammeled investigation of the illegal acts of the police against his employer is directly settled by the decision. This right, so the case holds, neither state nor city, could abridge, but, on the contrary, should protect.

It is submitted that to require that Leo M. Frank should not defend himself against the charge of murder, or perfect his extraordinary motion for a new trial by proof that the evidence obtained against him was not credible because of the illegal and criminal means employed to obtain it, except upon the condition that those employed by him to make the necessary investigations which he could not make, being in jail, should work and investigate under the supervision of those who were prosecuting him, would be to deprive him of his life or liberty without due process of law; and would be to deny him the equal protection of the laws. As a corrolary to this proposition, the constitutional provisions protects those employed to do the work.

But it is said that no one may assert another's constitutional rights in his own behalf. Where there is no privity or community of interest this is generally true; but like all good rules it has its exceptions.

We apprehend that if a statute were passed requiring a sheriff, under penalty, to hang, without trial, a person indicted for a certain crime; and the sheriff should refuse to obey the law, and the penalty were about to be enforced against him he could assert the unconstitutionality of the statute on the ground that its enforcement would deprive the person required to be hanged without trial of his life without due process of law.

In the case of Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. Ed. 832, the court having reached the conclusion that the statute of Louisiana could not limit the contractual powers of a person in another state, held also that the statute could not reach one who in Louisiana did an act to make that contract effectual; in other words, Allgeyer was allowed to set up the constitutional privileges of his non-resident correspondent.

The right of the prisoner to take the necessary means for his full and proper defense, begets in the person employed as being necessary to the successful prosecution of that defense a like right to do the acts which are appro-

priate to the defense, and both of these are rights which are protected by the Fourteenth Amendment of the Constitution of the United States.

Logan vs. United States, 144 U. S. 263, 36 L. Ed. 429;

In re, Quarles 158 U. S. 532, 39 L. Ed. 1080;

In re, Yarbrough, 110 U. S. 651, 28 L. Ed. 274.

These cases are cited, not for the ultimate and specific proposition which they decide, namely, that the Federal Government can protect, by affirmative penal legislation, those rights which are conferred, either expresly or by implication, by the Constitution, but because all of them hold that where a major right exists the protection of that right includes as a necessary consequence the protection of all rights subsiduary and ancillary to it. That is to say, as applied to the case at bar, it being unconstitutional to deprive a prisoner of the right to defend himself in the courts by all adequate and proper means and to employ others where necessary to aid him in his defense, it is likewise unconstitutional to deprive the persons whom it is necessary for him to employ for that purpose of the right of accepting and properly executing the employment. In other words, to deprive Leo M. Frank of the right to defend himself from the charge of murder and to employ detectives to make lawful investigations for him would be to deprive him of the rights guaranteed by the fourteenth amendment of the Federal Constitution; and it follows that this right as a major right includes, with like protection, the subsidiary right which, as a corrollary, flowed to the detectives, of accepting and executing that employment.

REPLY TO POSITION TAKEN BY DEFENDANT IN ERROR.

While the preparation of this brief was in progress counsel for the defendant in error has served copy of a

motion to dismiss and affirm and a brief in connection therewith. Some of the propositions therein submitted are already covered by the foregoing brief, but some of them are new.

In the brief of our opponents on the motion to dismiss (p. 7) the position is now taken that since the Burns Agency, through its local representatives, had a permit from the police commissioners, all that Lehon would have had to do to comply with the ordinance was to be approved by the chief of police—this under Sec. 2027 of the City Code. That section provides:

> "Sec. 2027. Certificate as to Character.—No detective agency now or hereafter licensed by the city of Atlanta shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by the Board of Police Commissioners and the Chief of Police, and a certificate to that effect lodged with said detective agency."

But the only penalty for violation of that section is contained in Section 2028 of the City Code, and is forfeiture of the agency license. Plainly, Lehon was not convicted under that section, since he was punished by fine, with alternative of imprisonment under the provisions of Section 2024 which provides:

> "Sec. 2024. Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision.—No person, firm, company or corporation shall carry on or be engaged in the business of a private detective or detective agency, unless such person, firm or corporation has been first recommended for license or permit for such detective business or agency by the Board of Police Commissioners of said City; but in all cases in which such recommendation is made and certified by the Board of Police Commissioners to the

> Clerk of Council, a license or permit shall be thereupon issued for such business. When so licensed, the licensee shall take the oath of a city detective, and be subject to police supervision. Any person, firm or corporation who shall be hereafter engaged in the business of a detective or detective agency in said City, outside of the police force of said City, and without a license issued as hereinabove provided for, shall be punished by a fine of not exceeding Five Hundred Dollars, or imprisonment for not exceeding thirty days, either or both, in the discretion of the Court."

To the original charge against the accused which was stated in indefinite language, a demurrer was filed calling for further information as to the nature of the charge. (Exhibit B, transcript pp. 28, 29). The charges were amended by adding "that the defendant is charged under sections 2024, 2025, 2026 and 2027 of the City Code of Atlanta of 1910 with carrying on a private detective agency in said city and doing the business of a private detective without a permit therefor and without being passed upon as required by said ordinances, and in that he did the business of a detective without being approved by the Chief of Police or Board of Police Commissioners as requested by these sections of the City Code cited above." So that while Section 2027 is mentioned in the charge, there was no act charged against him under that section, which is directed solely against detective agencies sending out unlicensed agents and not against the agents themselves.

The opposing brief on the motion to dismiss and affirm (p. 10) stresses the point that the Court of Appeals has held that a detective is a peace officer, and therefore the regulation thereof is a matter exclusively within the police power. The plaintiff in error has not insisted that the State does not have full and complete control of its police officers and peace officers and all others who exercise any authority over

the enforcement of the laws of the State, and may not confine appointments to these offices to residents. But in this case, the striken special plea, judicially admitted to be true, alleged that the defendant had exercised none of these functions; and the evidence on this point is likewise undisputed. The Court of Appeals, in deciding the case, fairly recognized this fact, and met the question fairly by saying "**Whatever may be the terms of his employment,** a detective is in essence a quasi peace officer." It is from this judgment of the Court of Appeals that this writ of error has been sued out; and we respectfully insist that the holding is erroneous.

When the State undertakes to exclude citizens of other states from occupation, open to its citizens, this court will look beyond mere definitions, and will look to see what are the terms of the employment, and whether the business actually pursued, irrespective of what anw state legislative or judicial body may call it, is such as that the State may confine the pursuit of it to its own citizens. The Supreme Court of the United States will disregard all form and superficiality and look to substance.

Coppage vs. Kansas, 236 U. S. 1; 59 L. Ed. 441;

Chicago, etc., Ry. Co. vs. Chicago, 166 U. S. 226, 234, 41 L. Ed. 979;

Fayerweather vs. Ritch 196 U. S. 276, 297; 49 L. Ed. 193;

Scott vs. McNeal, 154 U. S. 34; 38 L. Ed. 896.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 103

DAN S. LEHON, *Plaintiff in Error,*

vs.

THE CITY OF ATLANTA.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

BRIEF OF JOHN D. LITTLE, ARTHUR G. POWELL, MARION SMITH and MAX F. GOLDSTEIN,
Attorneys on Behalf of the Plaintiff in Error.

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Attorneys on Behalf of the Plaintiff in Error.

ABSTRACT OR STATEMENT OF THE CASE.

THE QUESTIONS PRESENTED.

The questions involved are as follows:

(1) Whether, as against the due process clause and the equal protection clause of the federal constitution, a municipality can abolish the occupation of a private detective, by requiring all private detectives to make application for a permit to the police commission of the city, obtain the approval of the chief of police, take the oath of the members of the police force (which oath binds them to make

arrests and perform all the other duties of public police officers of the city) and work under police supervision, thereby fully converting them from private detectives into public police officers.

(2) Whether a municipal ordinance of the character above described is constitutional where it is construed by the municipal authorities and the highest state court having jurisdiction to pass on the question as including in the word "detective" a person who being an office manager of a detective agency merely looks after office details, the employment and paying of operatives, and the assisting of counsel in the preparation of a motion for a new trial in a criminal case by interviewing witnesses, and who does no sleuth work, and exercises no function of a police or peace officer.

(3) Whether such an ordinance can be constitutionally enforced against a citizen of the State of Louisiana, by punishing him for doing only the acts mentioned above, when under the ordinances in question it is unlawful for any one to act as a private detective except upon his qualifying as a peace officer or public detective, and when the only municipal board qualified to issue the preliminary permit and the chief of police who must approve have both construed the ordinances as allowing only residents of the State of Georgia to receive permits, and have enforced the construction by uniform rule and practice; and when there is a statute making it criminal for any one other than a citizen of the State to act as a public "peace officer or detective."

(4) Whether one who is a citizen of another state but who does not act as a peace officer or public detective, but does only acts of a private nature in the line of an ordinary occupation having no connection with the duties of a public office is precluded from raising the question that

the ordinances referred to above, as construed by the local authorities and the highest state court having jurisdiction to pass on the same, discriminate against him by denying to him privileges which the ordinance and statute referred to confine to citizens of the state, because he carried on the private business referred to without applying for the permit or approval required by the ordinance, it appearing that the municipal authorities are enforcing the ordinance against him by fine or imprisonment, and it also appearing that the accused's employer had been informed in advance by the municipal authorities that none of his non-resident employees could be given permits; and that there is a state statute which would have made it criminal for him to complete his application.

(5) Whether as against the due process clause, and the equal protection clause of the federal constitution an ordinance which makes it penal for a private detective to work except with the approval of the chief of police and under police supervision, can be enforced under the circumstances of the particular case, to-wit: one Frank had been convicted for murder; an extraordinary motion for a new trial was pending; the chief of police and the police force under him were assisting in the prosecution of the case; the defendant Frank and his counsel were charging the chief of police and the members of the force with having procured evidence for the prosecution by illegal and criminal methods; the plaintiff in error acted as office manager for a detective agency employed to investigate the alleged illegal and criminal activities of the police officers, and besides exercising his managerial duties he also interviewed some of the witnesses and assisted counsel in the preparation of the motion for a new trial; and it appears that these services could not have been performed, if the ordinance were obeyed, for the obvious reason of the patent incompatibility of working in behalf of the defense and against the police officers, and yet working with

the approval and under the supervision of those very officers who were working in behalf of the prosecution, and whose illegal and criminal activities were the subject matter of the investigation. This question also involves the constitutional right of the defendant Frank to have his assistance in his defense and not to be required to subject his defense to the approval and supervision of his prosecutors, and, as a corollary, the right of the present plaintiff in error to be employed to do the work which Frank had the constitutional right to have done for him.

HOW THE QUESTIONS ARISE.

These questions are involved and the manner in which they are raised is as follows:

Lehon, the accused, was convicted in the recorder's court of the City of Atlanta for a violation of Sections 2024, 2025, 2026 and 2027 of the City Code of Atlanta for "carrying on a private detective agency in said city and doing the business of a private detective without a permit therefor and without being passed upon as required by said ordinances, and in that he did the business of a detective, without being approved by the chief of police or board of police commissioners as required by the sections of the city code cited above" (transcript, p. 2).

THE ORDINANCES IN QUESTION.

Copies of the sections of the city code in question are in the record (transcript, pp. 35, 36) and are as follows:

> "Sec. 2024. **Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision.**—No person, firm, company or corporation shall carry on or be engaged in the business of a private detective or detective agency, unless such person, firm, or corporation has been first recommended for license or per-

mit for such detective business or agency by the Board of Police Commissioners of said city; but in all cases in which such recommendation is made and certified by the Board of Police Commissioners to the Clerk of Council, a license or permit shall be thereupon issued for such business. When so licensed, the licensee shall take the oath of a city detective, and be subject to police supervision. Any person, firm or corporation who shall be hereafter engaged in the business of a detective or detective agency in said city, outside of the police force of said city, and without a license issued as hereinbefore provided for, shall be punished by a fine of not exceeding five hundred dollars, or imprisonment for not exceeding thirty days, either or both, in the discretion of the Court."

Sec. 2025. **Detective Agency—Bond Required—Use of Persons Injured By.**—All persons, firms or corporations, licensed under authority of the Mayor and General Council, for the purpose of operating a detective agency, or following the occupations of detective, shall give a bond in the sum of $1,000, payable to the City of Atlanta, for the use of any person, firm or corporation, injured or damaged on account of any illegal act of such agency or detective or persons employed as detectives by such licensed agency, or detective or any employee in and about their business licensed as aforesaid."

Sec. 2026. **Penalty.**—Any person, firm or corporation carrying on a detective agency or following the occupation of detective, without giving bond as required in the foregoing section, shall, on conviction in the Recorder's Court, be punished by a fine not exceeding $500.00 or sentenced to work on the streets or public places of the city, not exceeding thirty days, either or

both penalties to be inflicted in the discretion of the Recorder."

"Sec. 2027. **Certificate as to Character.**—No detective agency now or hereafter licensed by the City of Atlanta, shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by the Board of Police Commissioners, and the Chief of Police, and a certificate to that effect lodged with said agency."

"Sec. 2028. **Penalty.**—Any detective now or hereafter licensed by the City of Atlanta that sends out any person or agent to do detective work without the approval provided in preceding section of this ordinance shall thereby forfeit the license granted for such agency, and if it thereafter continues said detective agency, any person, agent or officer or manager of such agency shall, on conviction in the Recorder's Court of a violation of this ordinance, be fined for each day's operation as a separate offense, not exceeding two hundred dollars, or imprisoned not exceeding thirty days, or forced to work upon the public works not exceeding thirty days, either or all of such penalties to be inflicted in the discretion of the Recorder."

STATE STATUTE IN CONNECTION WITH WHICH ORDINANCES ARE TO BE CONSTRUED.

These ordinances are to be taken in connection with Sections 337 and 338 of the Penal Code, (1910) of the State of Georgia, as follows:

"Sec. 337. **Appointment of Peace-Officers and Detectives.** No sheriff, mayor, or other person authorized by law to appoint special deputy-sheriffs, constables, marshals, policemen, or other peace-officers or detect-

ives, to preserve the public peace or detect crime, shall appoint, as such special deputy, special constable, marshal, policeman, or other peace-officer or detective, any person who is not a citizen of this State, and no person shall assume or exercise such functions, powers, duties, or privileges incident and belonging to the office of special deputy-sheriff, special constable, marshal, or policeman, or other peace-officer or detective, without first having received his appointment in writing from the lawfully constituted authorities of the State.

"Sec. 338. **Acting as Peace-Officer Without Authority.** Any person who shall, without authority, exercise or attempt to exercise the functions of, or hold himself out to anyone as, a deputy-sheriff, marshal, policeman, constable, or other peace-officer or detective shall be guilty of a misdemeanor; Provided, that nothing in this Article shall be construed to interfere with the police powers granted to conductors of passenger trains. Nor shall this and the preceding section apply in times of riot or unusual disturbance, or in other instances provided for by law."

The accused filed a special plea setting up the unconstitutionality of the ordinances. The trial court struck the special plea on general demurrer to the same on the ground that it was insufficient in law. (Transcript, p. 2).

The accused thereupon followed the statutory method of review, that is by presenting a verified petition for certiorari to a judge of the Superior Court, and, upon his endorsing refusal of sanction thereon, taking bill of exceptions and writ of error to the Court of Appeals. The Court of Appeals affirmed the judgment. Under the Georgia practice when this proceeding is taken, the facts stated in the verified petition for certiorari are judicially taken as the truth of the case; hence the case may be considered

as being here on undisputed facts; and this is especially true where the trial court struck the special plea on general demurrer, it being presumed in such cases that if the plea had not been stricken and the accused had been given opportunity to do so he would have proved all the facts as pleaded, and that therefore, for the purposes of the questions involved, the opposite party admits all facts stated in the plea to be true. (For a statement of the practice and the presumption as to the truth of the case as claimed by the accused, see Linder vs. Renfroe, 1 Ga., App. 58; Marks vs. State, 8 Ga. App. 283.)

THE FACTS.

The facts briefly stated are as follows:

Lehon was a resident of Louisiana, being the manager of the Southern Division of the Wm. J. Burns National Detective Agency, with headquarters in New Orleans. That Agency was duly licensed in Atlanta, the license being taken in the name of one Sears, a citizen of Atlanta, it being understood, however, at the time that he was taking it as local manager of the Burns Agency, (Transcript, pp. 11, 13, 22, 36, 37, 39).

Lehon came to Atlanta to assist the Burns Agency in the defense of one Leo M. Frank, charged with murder; the work he did being the general supervision of the local office, the employment of operatives, and the checking up with the witnesses certain testimony alleged to have been given by them in connection with the case, and to give assistance to defendant's counsel in the preparation of the case.

He exercised none of the functions of a police officer; nor any of the sleuth work of an operative detective.

He did not apply for or secure the approval of the chief of police or the police board, nor did he report to the chief of police as required by the ordinances.

THE OATH REQUIRED BY THE ORDINANCES.

He did not, therefore, take the oath prescribed in Section 2024 of the city charter, which oath is found in the charter of the City of Atlanta (an act of the general assembly of the State of Georgia of which the courts take cognizance) i. e., in Georgia Laws 1874, p. 135, section 37, which is to be taken in connection with section 38 of the same statute, as follows:

> "Sec. 37. They shall take an oath, faithfully and impartially to discharge the duties imposed on them by the laws of the State, and the ordinances of the City, and shall give such bonds as may be required of them by the City ordinances."

> "Sec. 38. It shall be their duty to make arrests of any persons violating the ordinances of said City, with or without summons, and also with or without warrant. They shall likewise make arrests of any persons who have violated the statutes of said State, and their arrests for such violations are hereby authorized, either with or without warrants therefor. They shall perform such other duties as may be imposed by the laws of the State, and ordinances of the General Council."

SUMMARY OF THE SPECIAL PLEA.

This special plea made the point that the ordinances are void on the following grounds in substance, (omitting those which do not involve federal constitutional questions):

That the right to act as a private detective or to run a detective agency is a valuable property right, also a right of personal liberty, and this is especially true when the activities are employed on behalf of one accused of crime; that the ordinances, when construed together, absolutely

prohibited the occupation; and that this was especially true as to the activities for which he was being tried, namely acting as an investigator on behalf of one accused of crime where the police force of the city were prosecutors and where the particular matter under investigation was the alleged illegal and criminal methods used by the police in the procurement of evidence in that case; and that the requirement that he should take the oath of a policeman, be approved by the chief of police and work under police supervision, and report to the chief of the police would render his task impossible.

That he is a citizen of Louisiana, and that under the ordinances, taken in connection with the State law, and as construed by the police commission, under an unbroken practice of that board, he could not be given a permit because the board had ruled and had enforced the ruling, that none but citizens of Georgia could be licensed as private detectives. That the ordinance was, therefore, void as depriving him of liberty and property without due process of law, denying him equal protection of the laws, and refusing to him as a citizen of Louisiana privileges and immunities granted to citizens of Georgia. These same points in substance arise under the evidence.

THE UNDISPUTED FACTS.

There is no dispute or contradiction in the record as to these facts.

The accused acted only as a private detective, i. e., as one who did office work in checking up the reports of operative detectives and who in some cases in person interviewed and obtained statements from witnesses. His chief duty was to assist defendant's counsel in the preparation of the evidence in the case of Leo M. Frank (transcript, p. 18).

That the accused did not act or assume to act as a pub-

lic detective. He did not exercise or assume to exercise any function as a police officer or as a peace officer.

That the accused is a citizen of Louisiana.

That the police commissioners of the City of Atlanta have construed the law as prohibiting them from granting any permit, license or recommendation to any detective, public or private, unless he be a citizen of Georgia. This is admitted by the demurrer to the special plea (see transcript, p. 34) and is shown by the testimony of the police commissioners themselves (transcript, pp. 21-23). The testimony of the chief of police shows that he likewise construed the ordinances (see transcript, pp. 18, 19).

That while the accused had not personally made application to the commissioners for a permit or to the chief of police for his approval as a private detective, the Burns Agency of which he was an employee, had been notified in advance of the board's construction of the ordinances, and of the fact that no permit could be issued to him unless he became a resident of the City of Atlanta. (See Exhibit "H" to the testimony, transcript, pp. 38-41, and testimony of commissioner Johnson, transcript, pp. 22, 23.)

That the chief of police and the other members of the police force of the City of Atlanta were actively assisting the prosecution in the case of Leo M. Frank.

That one of the principal matters involved in the investigations being made by and under the direction of the accused was certain alleged illegal and criminal methods that had been used by these police officers in procuring evidence for the State.

That compliance with the ordinances would have rendered the performance of this service futile, if not impossible, since the ordinances required the disclosure to the chief of police of the activities of all private detectives and required them to work under the supervision of the police. It is obvious that an investigation of illegal and criminal practices of the chief of police and his police officers could not be made effectively under the supervision of the very

men who were accused of the illegal and criminal practices; and it is so alleged in the special plea and shown in the evidence.

The exceptions to the overruling of the special plea, and the other exceptions made by the assignments of error in the petition for certiorari present certain constitutional questions, which, however, are so far as this court is concerned, set out in the assignments of error presented in connection with the writ of error from this court, and which therefore are not repeated here.

THE HOLDING OF THE STATE COURT OF APPEALS.

The Court of Appeals held:

That the ordinances do not conflict with either state or federal constitution.

That although the ordinance had the effect to make it impossible for any private person to carry on the business of a private detective, the ordinance was nevertheless valid, on the ground that the municipality had the power to prevent interference with its police department.

That irrespective of the terms of his employment a detective is in essence a quasi police officer, and subject to municipal control.

That the right of the municipality in these respects is superior to the property right of the individual to engage in the occupation, and that, therefore, to prohibit the occupation is not to deprive the individual of property or liberty in violation of the due process of law clause of the federal constitution or to deny him the equal protection of the laws.

That the court would not pass upon whether the police commissioners could grant a permit to a non-resident, nor upon the question as to whether the uniform rule and practice of the police commissioners in refusing permits to non-residents discriminated against the plaintiff in error

as a citizen of Louisiana, since he had not made application for a permit.

That under the evidence his activities were such as to make him a detective within the purview of the ordinance.

SPECIFICATON OF THE ERRORS RELIED UPON.

The following errors are relied upon:

I.

That the Court of Appeals of the State of Georgia erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari presented by the plaintiff in error, seeking to review and set aside the conviction of the plaintiff in error in the recorder's court of the City of Atlanta, on the ground that the ordinances of the City of Atlanta were and are void and unconstitutional in that the enforcement of said ordinances deprived said plaintiff in error of his liberty and property without due process of law, and also in that they denied to him the equal protection of the laws, (thereby being repugnant to the fourteenth amendment of the Constitution of the United States) and in that the enforcement of said ordinances denied to plaintiff in error, who was a citizen of the State of Louisiana, privileges which were allowed to citizens of the State of Georgia, namely the privilege of engaging in the work of a private detective, (thereby being repugnant to and violative of paragraph 1, section 2 or article 4 of the Constitution of the United States) and that the decision and judgment of the Court of Appeals of Georgia was, therefore, violative of and repugnant to the Constitution of the United States, and especially the portions thereof referred to above.

II.

The said court erred in holding and adjudging that the municipal ordinances of the City of Atlanta under which the plaintiff in error was convicted in the recorder's court of the City of Atlanta were not and are not, as applied to the plaintiff in error in the present case, unconstitutional, null and void because they were and are repugnant to and violative of the fourteenth amendment of the Constitution of the United States for the reason that the said ordinances and the enforcement thereof deprived the plaintiff in error of his liberty and property without due process of law, and denied to him, as a person within the jurisdiction of the State of Georgia, the equal protection of the laws.

III.

That said court erred in holding and adjudging that the making and enforcement of the municipal ordinances of the City of Atlanta under which the plaintiff in error was tried and convicted in the recorder's court of the City of Atlanta were not and are not violative of and repugnant to paragraph 1, section 2 of article 4 of the Constitution of the United States which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

IV.

That the said court erred in holding and adjudging that no defense was presented by special plea filed by the plaintiff in error in the recorder's court of the City of Atlanta, wherein the plaintiff in error specifically set up and pleaded that the ordinances of the City of Atlanta under which he was accused were unconstitutional, null and void in that they deprived him of his liberty and property without due process of law, and denied him the equal protection of the

laws, also in that they deprived Leo M. Frank, the person on whose behalf the plaintiff in error was acting in the transaction for which he stood charged, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; also in that they abridged the privileges and immunities of plaintiff in error who was a citizen of the State of Louisiana, and of the United States, in that said ordinances denied to him the privileges and immunities enjoyed by citizens of the State of Georgia likewise circumstanced; and also that the enforcement of said ordinances, under the facts in said special plea recited, (and by the demurrer thereto admitted to be true), deprived the plaintiff in error and also said Leo M. Frank, for whom he was acting as aforesaid, and each of them, of their liberty and property without due process of law, and denied to each of them the equal protection of the laws and abrigded the privileges and immunities of plaintiff in error as a citizen of the United States and discriminated against him as a citizen of another State by refusng to him the privileges to which the citizens of the several States were entitled and which in the enforcement of said ordinances were so limited as to be enjoyed only by citizens of the State of Georgia, and in adjudging and holding that said special plea was insufficient in law; and that the said Court of Appeals erred in sustaining the action of the recorder of the City of Atlanta in striking and dismissing said special plea as being insufficient in law.

V.

That said court erred in holding and deciding that the right guaranteed to the plaintiff in error by paragraph 1, of section 2 of article 4 of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states," had not been denied to him in the enforcement of the ordinances of the City of Atlanta

under which he was tried and convicted in the recorder's court of the City of Atlanta; notwithstanding he was charged with having acted as a private detective in the City of Atlanta without having been approved by the Chief of Police of said City of Atlanta and without a permit from the Police Commissioners of said city, and it appeared that the plaintiff in error was a citizen of the State of Louisiana, and that under the views of the law as held by the Chief of Police of Atlanta, he approved only citizens of Georgia as private detectives, and under the views of the law was held by the Police Commissioners, and their uniform course of practice, said Commissioners granted permits only to citizens of the State of Georgia to act as private detectives.

VI.

That the court erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari of plaintiff in error, brought to review and reverse the judgment of the recorder of the City of Atlanta, convicting him of violating the ordinances of said city by carrying on a private detective agency and doing the business of a private detective in that the court held that the acts shown by the evidence to have been done by the plaintiff in error (in substance that he as a managing agent or supervisor of a private detective agency, which through another agent had been duly licensed and granted a permit to do business in Atlanta assisted the defendant in a criminal case and his attorneys in the preparation of an extraordinary motion for a new trial, by openly, and not secretly, interviewing the witnesses who had made and who were about to make affidavits for use in said case, and by acting as a go-between or as a channel for conveying information to and from the defendant's counsel and the detective operatives employed on the case by the employer of the plaintiff in error) came within the purview of the said ordinances, and in that the court, in connection with

this construction of the ordinances, held that the ordinances so construed and enforced against said plaintiff in error did not deprive him of his liberty and property without due process of law.

VII.

That the court erred in holding that the ordinances of the City of Atlanta under which the plaintiff in error was convicted are not and were not void and unconstitutional as supplied to the transaction for which the plaintiff in error was convicted, in that they deprived the plaintiff in error of his liberty and property without due process of law and denied the equal protection of the laws to him, and also in that they deprived the person for whom plaintiff in error was employed and acting, namely Leo M. Frank, a prisoner charged with and convicted of murder with a motion for new trial pending, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; and in sustaining the enforcement of said ordinances against the said constitutional provisions, notwithstanding that it became necessary and important to the defense of said Leo M. Frank against the charge aforesaid that he employ said plaintiff in error to perform for him the services which said court held to constitute engaging in the business of a private detective within the purview of said ordinances, and notwithstanding it appeared that the Chief of Police of Atlanta (whose approval under said ordinances was a condition precedent to the plaintiff in error being permitted to perform said services and under whose supervision the plaintiff in error would have been compelled to perform said services, if he had complied with said ordinances) was prosecutor in the said case against said Leo M. Frank, so that said services could not have been performed for said Leo M. Frank if the plaintiff in error had complied with said ordinances, and notwithstanding the effect of said ordinances was to com-

pel the defense in said case of Leo M. Frank to disclose its activities in preparing its evidence to the prosecutor without requiring the prosecution to make like disclosure to the defendant; and especially so since the chief object and need of the employment of the plaintiff in error was to prepare the evidence as to alleged illegal methods used by said Chief of Police, the prosecutor, and those working under him in procuring and presenting evidence against said Leo M. Frank in said matter.

ARGUMENT.

ANALYSIS OF THE ORDINANCES.

Notwithstanding the circuitous route taken by the ordinances in question to reach the end in view, their object and purpose are frankly stated in the title to the first of them (City Code, Section 2024) as follows: "Detective Agency Business Abolished".

The abolition of the business of private detectives is accomplished by requiring a license or permit from the police commissioners and by requiring the licensee to take the oath of a city detective and to be subject to police supervision. This ipso facto and at once converts the private detective from a private detective into a police and peace officer of the city. A reading of the oath, and the statement of the duties thereby assumed, both of which are set out in full in the preceding statement of facts show undoubtedly that this is correct.

The meaning and effect of the ordinances would have been exactly the same if it had been directly enacted under penalty that "none but public officers of this city who are appointed, licensed or permitted by the Board of Police

Commissioners, and who have taken oath as such and duly given bond, and who work under police supervision shall do the work hitherto done by private detectives and private detective agencies, and all other persons are forbidden to follow the occupation of a private detective."

DEFINITION, BY CONSTRUCTION, OF THE WORDS, "PRIVATE DETECTIVE."

The phrase "private detective" has no clearly defined meaning, but for the purposes of this case it has been defined to the extent that it includes one who exercises no public function, who exercises none of the functions of a peace or police officer, but who only does managerial office work, interviews witnesses and reports to counsel—the work of an ordinary investigator; in fine, the same character of work that the chief claim agent of a railroad company or other corporation would do—because this point was expressly made that these activities did not constitute one a private detective within the purview of the ordinances, and was decided against by the Court of Appeals of Georgia.

THE OCCUPATION, AN ORDINARY LAWFUL CALLING.

The occupation of private detective, especially as defined in this case, is a lawful calling. It is so in its nature, and is so recognized by the statutes of Georgia. The general tax act of the State of Georgia, found in Civil Code of Georgia (1910) section 931 taxes it as an ordinary occupation in the following language:

> "Upon each and every person doing detective work, or engaging in the business of a detective for hire or compensation, the sum of ten dollars for each located office established in this State, and if no established office, then said tax shall be required in each county in

this State wherein any detective may do or offer to do detective work."

In Georgia the taxing of a business in the general tax act carries the conclusive implication that it is a lawful occupation. Miller vs. Shropshire, 124 Ga. 829.

> "The general tax acts * * * * are purely revenue measures, though enforceable by penalty for failure to pay the imposed tax, as distinguished from police measures designed to regulate internal affairs."
>
> Miller vs. Shropshire, Supra., p. 832.

The right to engage in the business of a private detective is in its very nature a valuable property right—a reputable means of earning a livelihood.

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may chose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one in like conditions. The interest, or as it is sometimes termed, the estate acquired in them, that is the right to continue their prosecution is often of great value to the possessor, and cannot be arbitrarily taken from them any more than real or personal property can thus be taken."
>
> Dent vs. West Virginia, 129 U. S. 114, 121, 32 L. Ed. 623, 625.

See also the valuable monographic note appended to the case of State vs. Hinman, 65 N. H. 103, as reported in 23 Am. St. Rep. 22, 25.

The occupation pursued by the plaintiff in error, as characterized by the acts he did, call it what you may, is a plain, common ordinary business.

> "There is no magic in language, though used by a constitutional convention, which can change a private business into a public one. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare by organic act or legislative ordinance that such place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors by giving them a new designation." Per Mr. Justice Field, dissenting in Munn vs. Illinois, 94 U. S. (4 Otto) 113, 24 L. Ed. 77, 88.

The ordinances here involved are not regulations of a business, but as has been pointed out are absolute prohibitions.

THE CONSTITUTIONAL RIGHT TO FOLLOW A LAWFUL CALLING.

The right to pursue any lawful calling is, of course, a right protected by the federal constitution.

Allgeyer vs. Louisiana, 165 U. S. 578. 41 L. Ed. 832.

There is no intention on the part of the plaintiff in error to argue that the State cannot regulate business, or in some cases abolish or suppress occupations or create monopolies in certain occupations, or that the consent of some board or officer may not lawfully be made a condition precedent to individuals engaging in certain businesses.

We understand the rule to be that the fourteenth amendment of the federal constitution guarantees the citizens against arbitrary spoliation of property rights in private occupations, and guarantees equal protection to all simi-

larly situated; that no general and unlimited power resides in the State legislative bodies to regulate purely private business, except wherein it is affected with some public interest; that the means employed must not be unreasonable and unnecessary to the accomplishment of such lawful purpose as might justify legislation on the subject; that the interference with private business must not be arbitrary; that while the State may as to some occupations create a monoply this does not relate to purely private occupations; that in all cases the exercise of the police power is subject to the supervision of the courts.

Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220;

Dobbins vs. Los Angeles, 195 U. S. 223, 49 L. Ed. 169;

Lawton vs. Steele, 152 U. S. 133-137, 38 L. Ed. 385 388.

"The State has undoubtedly the power by appropriate legislation to protect the public morals, the public health and the public safety; but if, by their necessary operation, its regulations looking to either of these ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Connally vs. Union Sewer Pipe Co., 184 U. S. 540. 558, 46 L. Ed. 679.

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of action of purely personal and arbitrary power."

Yick Wo vs. Hopkins, 118 U. S. 356, 369, quoting ap-

provingly in Chicago M. & St. P. Ry. Co. vs. Tompkins, 176 U. S. 167, 172, 44 L. Ed. 417.

"It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises are subject to investigation in the courts with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

Dobbins vs. Los Angeles, 195 U. S. 223, 236, 49 L. Ed. 169.

"But this concession (that certain businesses may be regulated) does not in the slightest degree affect the proposition, which I deem a fundamental one, that the ordinary pursuits of life, forming the large mass of industrial vocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects, the liberty of pursuit."—Concurring opinion in Butchers Union Co. vs. Crescent City Etc. Co., 111 U. S. 746, 763; 28 L. Ed. 585, 589.

THE ORDINANCES, NOT AN EXERCISE OF THE POLICE POWER.

Even though the subject be one as to which the exercise of the police power is legitimate, the exercise must be had with due regard to constitutional rights and the regulation

must have relation to the end for the accomplishment of which the exercise of the police power is authorized. Under the guise of accomplishing some object within the police power the law making body cannot adopt regulations which are not legitimately adapted to that end and which infringe constitutional guarantees.

Vance vs. Vandercook, 170 U. S. 438, 42 L. Ed. 1100.

Whatever may be the supposed evil arising from leaving private detectives unregulated, the regulation must be directed toward that evil and not something else. If the object be to confine the business to persons of good character, that object is not accomplished by making the detectives take an oath to assume the duties of a public police officer; or by a regulation which confines the business to residents of the State. The question of the proficiency of a private detective would seem to be a matter in which the public is not concerned and with which only the private detective and his employer are concerned; but even if it is, the regulation in question is not designed to that end, except in the minor detail that no detective agency shall employ a private detective unless the latter's proficiency is approved by the chief of police. The detective agency probably would be a better judge of what type of man it needed than the chief of police. The activities of private detectives might be curbed by uniform regulations, but it is arbitrary to curb them by the requirement that regulates them only by putting them under the undefined, unrestricted, supervision and control of the police commission and the chief of police of the city.

When the ordinances are construed as a whole, especially in connection with the state statute with which they must be construed, and are carefully studied to ascertain the object in view in their passage, the conclusion irresistably forces itself on the practical mind that the only intent and purpose (theoretical or practical) of the ordinance was to

drive out of the business all detective agencies which would not co-operate with the police of the city, and do the bidding of the police authorities; first, by providing for police approval, then for the putting of every detective under the oath of allegiance, then for subjecting his activities to police supervison; also to exclude all non-residents from the business. The ordinances cannot fairly be construed as compatible with any other legislative design. And the evidence discloses that in practical operation they were given that effect.

If the phrase "private detectives" had been construed by the state authorities as including only those who exercised some function likely to affect public safety, good order or morals, the ordinances, on their face, (oppressive as they are) might not be so unreasonable or arbitrary as to justify judicial interference. For instance, private persons are sometimes employed to act as guards for individuals who are in danger of private violence, or as protectors of property in case of strikes, etc., and they undertake to make arrests for offenses committed in their presence, and to perform other services akin to those pertaining to peace and police officers. To place such activities under police supervision might be reasonable.

But here the occupation pursued has no relation to public safety, good order or morals or any of the other wards of the police power. The state authorities and the State Court of Appeals construe the ordinance as including this occupation. To regulate this business by the abolishment of it, and to transfer the sole right to pursue it to those licensed, sworn and supervised as public police officers, would seem to be purely arbitrary; it would appear that the regulation is neither reasonable nor necessary to any object legitimately to be accomplished in the exercise of the police power; that it creates a monopoly in a purely private business which the State would not have the power wholly to suppress.

MERE DEFINITION CANNOT TAKE AWAY CONSTITUTIONAL RIGHT.

At this point in the argument we call attention to a proposition which is involved not only in the question immediately under discussion, but also in practically all of the other questions in the case:

The proposition is, that any enactment which is not a legitimate and constitutional police regulation cannot be made such by being placed in the same act with a police regulation or by being enacted in a context which professes a purpose which would be the proper object for the exercise of that power.

Coppage vs. Kansas, 236 U. S. 1; 59 L. Ed. 441.

In the Coppage case, just cited, the Kansas statute professed to be an act to penalize the coercion of employees. The act penalized the coercion by employers or would-be employers of employees or applicants for employment as to agreeing not to join labor union as a condition to the employment or continuing in the employment.

The Kansas Court held that one who presented to his employee a written agreement to withdraw from a labor union, but left it optional with the employee whether he would sign or quit work was guilty under the act. The United States Supreme Court, held that the fact that the statute uses the word "coerce" or that the Kansas Supreme Court stresses that word in its opinion is immaterial; that since the state court treated the term "coerce" as applying to the only activities engaged in by the accused, the effect was to construe the statute as including these activities and to enforce it so as to prohibit them; "there being no finding nor any evidence to support a finding that the plaintiff in error was guilty in any other sense," that the Court would examine the evidence to the extent necessary in order to determine the federal question asserted.

The Court also said:

> "If the right that the plaintiff in error exercised is founded upon a constitutional basis, it cannot be impaired by merely applying to its exercise the term 'coercion'."

The court again reiterates, "to avoid possible misunderstanding," that the purpose declared in the title of the acts is immaterial—that "this court deals not with moot cases of abstract questions, but with the concrete case before it."

The court declared the statute unconstitutional as applied to the transaction in question.

Now in the case at bar we contend that under the guise of regulating peace and police officers, the municipal legislative body could not include in the enactment one who pursued an ordinary avocation having no relation to the functions of peace or police officers by calling him a "detective;" that the Court of Appeals having held that a detective is a peace officer "whatever may be the terms and purposes of his employment;" and "there being no finding nor evidence to support a finding that the plaintiff in error was guilty in another sense" than that he engaged in the non-public activities referred to; and the entire evidence being in the record, the Court will examine it to the extent necessary in order to determine the Federal right that is asserted; and that if the right that plaintiff in error exercised is founded upon a constitutional basis, the Court will protect it against impairment, notwithstanding its inclusion by the State authorities or courts in a false definition, or in an enactment which as to activities of another nature may be valid exercise of the police power.

THE DISCRIMINATION AGAINST PLAINTIFF IN ERROR ON ACCOUNT OF HIS CITIZENSHIP.

Thus far we have discussed the ordinances without regard to the question of discrimination between residents and non-residents, because the present case is a test case on which certain other cases depend in which the question of non-residence is not involved.

When we go a step further and get to the real object and result of the ordinance, namely, to prohibit all but residents of Georgia from doing private detective work of all kinds, the invalidity of the ordinance becomes, we submit, perfectly clear.

The State can of course prescribe that none but residents can hold public office in the State; but it is respectfully insisted that the State cannot lawfully prescribe that none but its own citizens who are public officers can carry on a purely private business.

For example, shoemakers are frequently justices of the peace, and vice versa. The State may lawfully prescribe that none but its own citizens may be justices of the peace; but it cannot then, without violating paragraph 1, of section 2 of article 4 of the Constitution of the United States, go further and prescribe that none but justices of the peace may be shoemakers.

The State of Georgia, through sections 337 and 338 of the Penal Code of 1910 (quoted in full in the abstract and statement of facts incorporated in this brief) has provided that none but citizens of the State may exercise any of the functions of "deputy-sheriffs, constables, marshals, policemen, or other peace officers or detectives, to preserve the public peace or detect crime". The word "detective" used in this statute, by its association, plainly means "public detective"; and, as this word, as used in this statute, has never been otherwise construed by the Georgia courts, we assume this court will adopt that construction. So construed, this statute is conceded to be lawful. But when,

following this statute, the city of Atlanta enacts that no one shall follow the occupation of private detective (and includes in the enactment by construction the purely private activities involved in the present case) who is not licensed and sworn as a public police officer working under police supervision, the unlawful discrimination against the non-resident is at once effective.

To state the proposition a little differently and in the concrete: Lehon is a citizen of Louisiana, under the protection of the constitutional guarantee that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; he is a managerial officer in a detective agency, performing purely private functions; he wishes to pursue his business in Atlanta in the State of Georgia; in attempting to do so he finds a local ordinance that for him to do so he must first become a public officer and be appointed and qualified as such, and must perform his businesses as such; he also finds a statute of the State of Georgia making it criminal for him to become such an officer by reason of his non-residence; citizens of Georgia may qualify to pursue the occupation, he may not because he is a citizen of another state. The discrimination intended by the ordinance, though somewhat indirectly effectuated, is nevertheless perfectly patent and well accomplished except for the constitutional guarantee which avoids the ordinance.

> "It is undisputably the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions."
>
> Dent vs. West Virginia, 129 U. S. 114, 121, 32 L. Ed., 623, 625.

"In all cases of the class to which this one before us

belongs it is a test question whether there is any discrimination in favor of the State or of citizens of the State which enacted the law. Whenever there is such discrimination it is fatal."

Howe Mach. Co. vs. Gage, 100 U. S. 676, 25 L. Ed. 755, 756.

Even in the exercise of the police power there must be no discrimination between residents and non-residents.

Webber vs. Virginia, 103 U. S. 344, 26 L. Ed. 565.

Even as to intoxicating liquors the rules applies.

Walling vs. Michigan, 116 U. S. 446, 29 L. Ed. 691;

Scott vs. Donald, 165 U. S. 58, 41 L. Ed. 632;

Vance vs. Vandercook, 170 U. S. 438, 42 L. Ed. 1100.

Statute prohibiting a non-resident from being a trustee void.

Roby vs. Smith, 131 Ind. 346, 31 Am. St. Rep. 442, 15 L. R. A. 792.

The principle is recognized in Georgia.

Gould vs. Atlanta, 55 Ga. 678 (1);

Atlanta vs. Jacobs, 125 Ga. 523 (1).

THE PLAINTIFF IN ERROR NOT PRECLUDED FROM RAISING THE QUESTION.

There is no dispute in the record that this discrimination exists, or that the police commissioners, to whom application for permits must be made, or the chief of police,

whose approval is necessary, had uniformly refused permits and approval to non-residents, they having construed the ordinance, taken in connection with the state penal statute on the subject, as forbidding the issuance of permits and approvals to non-residents. Counsel for the City took the position, and doubtless will urge it again, and the Court of Appeals of Georgia in its decision sustained the contention, that the plaintiff in error is not in a position to make the question because he made no application to the police commissioners or to the chief of police for permit or approval. They rely upon the proposition (perfectly sound when properly applied) announced in Gundling vs. Chicago, 177 U. S. 183, and recognized in a number of other cases, that where a statute makes the permit of an officer or tribunal a condition precedent to one's engaging in an occupation, one who has not applied for a permit, cannot make the point that the officer or tribunal is vested with an arbitrary discretion to refuse.

The present case is clearly without the reason given in those cases, and is, we submit, not within the rule.

Here all the valid parts of the ordinance (if any parts were valid) were complied with. The state, county and municipal license taxes were paid by the agency upon whom they were imposed. This puts the plaintiff in error in position to make the question. See—

Campbell vs. Thomasville, 6 Ga. App. 212 (18), 238.

THE STATE LAW MADE IT CRIMINAL FOR THE PLAINTIFF IN ERROR TO COMPLY WITH THE ORDINANCE.

However, the most cogent reasons why the plaintiff in error is excused from attempting to comply with the ordinances are these:

(1) Application on his part would be futile—an idle thing—because the police commission and the chief of police

had a uniform rule and practice, known both to them and communicated to the employer of the plaintiff in error, that no permit would be granted to a non-resident. Tender is always excused when the person to whom the tender is to be made has in advance formed and announced an intention to refuse.

(2) **Compliance with the ordinance on the part of the plaintiff in error would have been a crime on his part under the laws of the State of Georgia.** The license or permit could not be issued to him unless he contemporaneously took the oath of a city detective; and he could not take the oath (being a non-resident) without violating the provisions of Sections 337 and 338 of the Penal Code of Georgia (already quoted in full); which forbid that any, except citizens of Georgia, "shall **assume** or exercise such functions, powers, **duties** or privileges."

The ordinances, read in connection with the State law, embrace a legislative scheme by which no license or permit can be issued to a non-resident. The police commissioners and the chief of police so construed them, and properly so. The ordinances do not in express words forbid a non-resident from applying for a permit; but do enact such a legislative scheme as to forbid such an application.

It is not a case of an ordinance good in part and bad in part, where the bad can be separated from the good, and still leave a sufficiency of the legislative scheme intact to be enforced. If the main and pervading legislative object cannot constitutionally be accomplished, the ordinances fail as a whole, are of no force and effect, and no person is called upon to obey them in whole or in part; and no person should be punished for not obeying them.

VIOLATION OF CONSTITUTIONAL RIGHTS THROUGH THE ENFORCEMENT OF THEM, UNDER THE PARTICULAR CIRCUMSTANCES.

Coming now to the sixth question proposed at the beginning of this brief, we take up the proposition whether the enforcement of the ordinances under the particular circumstances of the present case were not violative of the due process and equal protection clauses of the federal constitution.

A statute, though fair on its face, may not be enforced if under the circumstances of a particular case it would deprive a person of life, liberty or property without due process of law or deny him the equal protection of the laws.

> Yick Wo vs. Hopkins, 118 U. S. 356; 30 L. Ed. 220;
>
> Dobbins vs. Los Angeles, 195 U. S. 223, 240, 49 L. Ed. 169.

To act as investigator for the defense in a criminal case and be under the supervision of the prosecutors in the case; to investigate the illegal and criminal activities of the police under the supervision of those charged with the illegal and criminal activities, are absurdities. To regulate the business of attorneys at law is probably a fair exercise of the police power, but to provide that the attorney for the accused in a criminal case should conduct the defense under the supervision of the prosecuting attorney would be abhorent to our sense of justice, as well as to the federal constitution.

> "Under our system the **people**, who are the subjects, are the sovereigns. Their rights, whether collective or individual, are not bound to give away to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in

power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered."

U. S. vs. Lee, 105 U. S. 196, 208, 27 L. Ed. 177.

The right to defend one's self against a criminal charge is a right protected by the federal constitution.

The right to defend one's self in the courts involves the right to employ all necessary and legitimate means to make that defense successful; and the right to employ others to assist in the defense, involves as a corrolory the right of those so employed to be employed and to perform the employment.

The right of both the government and of the accused to prepare for prosecution or defense, as the case may be, is an inherent right, and is one which is to be freely exercised without molestation.

In re, Quarles, 158 U. S. 532, 39 L. Ed. 1080.

The Quarles case decides the specific proposition that the right of the citizen to assist in the prosecution of a criminal case is one of his fundamental rights which is within the protection of the constitutional guarantees, but this holding is based on the proposition that the citizen has the same rights as to prosecution that he would have as to defense, and upon the implication that no one would deny that every citizen has the right to defend himself freely in the courts, and to have others to assist him with like freedom and protection,—that these are fundamentals embraced in the very covenant of government.

The proposition that Lehon had the free right to make an adequate and untrammeled investigation of the illegal acts of the police against his employer is directly settled by the decision. This right, so the case holds, neither state nor city, could abridge, but, on the contrary, should protect.

It is submitted that to require that Leo M. Frank should not defend himself against the charge of murder, or perfect his extraordinary motion for a new trial by proof that the evidence obtained against him was not credible because of the illegal and criminal means employed to obtain it, except upon the condition that those employed by him to make the necessary investigations which he could not make, being in jail, should work and investigate under the supervision of those who were prosecuting him, would be to deprive him of his life or liberty without due process of law; and would be to deny him the equal protection of the laws. As a corrolary to this proposition, the constitutional provisions protects those employed to do the work.

But it is said that no one may assert another's constitutional rights in his own behalf. Where there is no privity or community of interest this is generally true; but like all good rules it has its exceptions.

We apprehend that if a statute were passed requiring a sheriff, under penalty, to hang, without trial, a person indicted for a certain crime; and the sheriff should refuse to obey the law, and the penalty were about to be enforced against him he could assert the unconstitutionality of the statute on the ground that its enforcement would deprive the person required to be hanged without trial of his life without due process of law.

In the case of Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. Ed. 832, the court having reached the conclusion that the statute of Louisiana could not limit the contractual powers of a person in another state, held also that the statute could not reach one who in Louisiana did an act to make that contract effectual; in other words, Allgeyer was allowed to set up the constitutional privileges of his non-resident correspondent.

The right of the prisoner to take the necessary means for his full and proper defense, begets in the person employed as being necessary to the successful prosecution of that defense a like right to do the acts which are appro-

priate to the defense, and both of these are rights which are protected by the Fourteenth Amendment of the Constitution of the United States.

Logan vs. United States, 144 U. S. 263, 36 L. Ed. 429;

In re, Quarles 158 U. S. 532, 39 L. Ed. 1080;

In re, Yarbrough, 110 U. S. 651, 28 L. Ed. 274.

These cases are cited, not for the ultimate and specific proposition which they decide, namely, that the Federal Government can protect, by affirmative penal legislation, those rights which are conferred, either expressly or by implication, by the Constitution, but because all of them hold that where a major right exists the protection of that right includes as a necessary consequence the protection of all rights subsiduary and ancillary to it. That is to say, as applied to the case at bar, it being unconstitutional to deprive a prisoner of the right to defend himself in the courts by all adequate and proper means and to employ others where necessary to aid him in his defense, it is likewise unconstitutional to deprive the persons whom it is necessary for him to employ for that purpose of the right of accepting and properly executing the employment. In other words, to deprive Leo M. Frank of the right to defend himself from the charge of murder and to employ detectives to make lawful investigations for him would be to deprive him of the rights guaranteed by the fourteenth amendment of the Federal Constitution; and it follows that this right as a major right includes, with like protection, the subsidiary right which, as a corrollary, flowed to the detectives, of accepting and executing that employment.

REPLY TO POSITION TAKEN BY DEFENDANT IN ERROR.

While the preparation of this brief was in progress counsel for the defendant in error has served copy of a

motion to dismiss and affirm and a brief in connection therewith. Some of the propositions therein submitted are already covered by the foregoing brief, but some of them are new.

In the brief of our opponents on the motion to dismiss (p. 7) the position is now taken that since the Burns Agency, through its local representatives, had a permit from the police commissioners, all that Lehon would have had to do to comply with the ordinance was to be approved by the chief of police—this under Sec. 2027 of the City Code. That section provides:

> "Sec. 2027. Certificate as to Character.—No detective agency now or hereafter licensed by the city of Atlanta shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by the Board of Police Commissioners and the Chief of Police, and a certificate to that effect lodged with said detective agency."

But the only penalty for violation of that section is contained in Section 2028 of the City Code, and is forfeiture of the agency license. Plainly, Lehon was not convicted under that section, since he was punished by fine, with alternative of imprisonment under the provisions of Section 2024 which provides:

> "Sec. 2024. Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision.—No person, firm, company or corporation shall carry on or be engaged in the business of a private detective or detective agency, unless such person, firm or corporation has been first recommended for license or permit for such detective business or agency by the Board of Police Commissioners of said City; but in all cases in which such recommendation is made and certified by the Board of Police Commissioners to the

Clerk of Council, a license or permit shall be thereupon issued for such business. When so licensed, the licensee shall take the oath of a city detective, and be subject to police supervision. Any person, firm or corporation who shall be hereafter engaged in the business of a detective or detective agency in said City, outside of the police force of said City, and without a license issued as hereinabove provided for, shall be punished by a fine of not exceeding Five Hundred Dollars, or imprisonment for not exceeding thirty days, either or both, in the discretion of the Court."

To the original charge against the accused which was stated in indefinite language, a demurrer was filed calling for further information as to the nature of the charge. (Exhibit B, transcript pp. 28, 29). The charges were amended by adding "that the defendant is charged under sections 2024, 2025, 2026 and 2027 of the City Code of Atlanta of 1910 with carrying on a private detective agency in said city and doing the business of a private detective without a permit therefor and without being passed upon as required by said ordinances, and in that he did the business of a detective without being approved by the Chief of Police or Board of Police Commissioners as requested by these sections of the City Code cited above." So that while Section 2027 is mentioned in the charge, there was no act charged against him under that section, which is directed solely against detective agencies sending out unlicensed agents and not against the agents themselves.

The opposing brief on the motion to dismiss and affirm (p. 10) stresses the point that the Court of Appeals has held that a detective is a peace officer, and therefore the regulation thereof is a matter exclusively within the police power. The plaintiff in error has not insisted that the State does not have full and complete control of its police officers and peace officers and all others who exercise any authority over

the enforcement of the laws of the State, and may not confine appointments to these offices to residents. But in this case, the striken special plea, judicially admitted to be true, alleged that the defendant had exercised none of these functions; and the evidence on this point is likewise undisputed. The Court of Appeals, in deciding the case, fairly recognized this fact, and met the question fairly by saying "**Whatever may be the terms of his employment,** a detective is in essence a quasi peace officer." It is from this judgment of the Court of Appeals that this writ of error has been sued out; and we respectfully insist that the holding is erroneous.

When the State undertakes to exclude citizens of other states from occupation, open to its citizens, this court will look beyond mere definitions, and will look to see what are the terms of the employment, and whether the business actually pursued, irrespective of what anw state legislative or judicial body may call it, is such as that the State may confine the pursuit of it to its own citizens. The Supreme Court of the United States will disregard all form and superficiality and look to substance.

Coppage vs. Kansas, 236 U. S. 1; 59 L. Ed. 441;

Chicago, etc., Ry. Co. vs. Chicago, 166 U. S. 226, 234, 41 L. Ed. 979;

Fayerweather vs. Ritch 196 U. S. 276, 297; 49 L. Ed. 193;

Scott vs. McNeal, 154 U. S. 34; 38 L. Ed. 896.

Respectfully submitted,

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